LAW AND CONTEMPORARY PROBLEMS

VOLUME XI
1945-1946

SCHOOL OF LAW · DUKE UNIVERSITY

PRINTED IN THE UNITED STATES OF AMERICA BY
THE SEEMAN PRINTERY, INC., DURHAM, N. C.

LAW AND CONTEMPORARY PROBLEMS

PUBLISHED BY THE DUKE UNIVERSITY SCHOOL OF LAW

Subscription Price, $3.00 per Annum $1.00 per Number
Editorial and Business Offices, Duke University, Durham, N. C.

CONTENTS

WINTER-SPRING, 1945

ENEMY PROPERTY

SUMMER-AUTUMN, 1945

FINANCING SMALL BUSINESS

WINTER-SPRING, 1946

AVIATION TRANSPORT

SUMMER-AUTUMN, 1946

INTERNATIONAL TRADE BARRIERS

Professor E. R. Latty, *Special Editor*

LAW AND CONTEMPORARY PROBLEMS

VOLUME XI WINTER-SPRING, 1945 NUMBER 1

FOREWORD

Total war is fought in the field of economics and finance as well as on the field of battle. Economic warfare has gone far beyond simple prohibition against trading with the enemy. In the totalitarian state, property, private or otherwise, with respect to which control can be exercised is an instrument of warfare—and even in times of peace an instrument for the domination of economies of other countries, preliminary to war. The Government of the United States as well as other Governments, has taken vigorous defensive and counter measures. It is not the purpose of this symposium to explore the manifold phases of economic warfare but rather to focus upon those measures which have been taken with respect to property which, with the lack of refinement characteristic of a Foreword, can be called "Enemy Property." These measures have included, necessarily, complication of details and techniques which are perhaps as characteristic of this war as are the technological developments in electronics or aviation. The resulting problems are correspondingly complex. The large number of belligerents, the early successes of our enemies in overrunning numerous countries, the equivocal position of neutrals—all against a background of twentieth-century patterns of transportation, communication and inter-country movement—have added to the complexity and magnitude of the problems. This symposium is published in the hope of exploring and explaining some of those problems.

The symposium opens with a comparative survey by Mr. Domke of the various measures that the western hemisphere nations have adopted in the way of economic and financial controls over property and transactions in an effort to protect themselves against inimical influences.

The second article, by Mr. Reeves, is an exhaustive study, in some 40 pages, of the Freezing Control program of the United States and goes into the background of international financial history, the evolution of the Freezing Control, its objectives, policies, interpretations, applications, and techniques, with special reference to blocked property within the United States.

Tying in with both the foregoing article and those which immediately follow, Mr. Eisner's article, "Administrative Machinery and Steps for the Lawyer," surveys,

as its title indicates, the agencies administering the property controls and contains practical suggestions for the legal practitioner.

While the foregoing articles touch upon the Office of the Alien Property Custodian, the fourth and fifth articles are entirely devoted to this subject; Mr. Myron's article discusses in general the activities of the Custodian, including the types of control exercised over various classes of property, while the Sargeant-Creamer article is devoted exclusively to the highly important problem of enemy patents. The relation between patents and cartels is, of course, obvious and accordingly the patent discussion is followed by Mr. Berman's article on "Cartels and Enemy Property," which gives an insight into the sphere of another agency, the Department of Justice.

One of the more fertile fields of legal uncertainty, of even greater significance during the post-war period than during the period of warfare, is the Conflict of Laws arising from divergent measures taken by and views prevailing in the various countries. The problems to which these divergencies give rise, particularly in the matter of jurisdiction and "situs," are discussed in the seventh article by Mr. Rabel.

The ever-present question of constitutionality involved in the somewhat drastic wartime measures is treated in the eighth article, by Mr. McNulty; this is followed by a very brief three-page comment by Mr. Wechsler who does not entirely agree with Mr. McNulty on a question of remedies available for the return of seized property.

The last three articles discuss various phases of the severity of treatment with which claimants of property may be faced; they touch upon matters which, presumably, will in due course be covered by appropriate legislation. The title of Mr. Sommerich's article, "A Brief Against Confiscation," is indicative of its scope and approach. This article and the following one by Mr. Rubin are in part essays in international law. Of particular interest, in Mr. Rubin's article, is the thesis that, as a practical matter, the enemy owner of private property is probably going to find himself with a claim against his own government rather than in re-possession of his property. The concluding article on "Post-War Prospects for Treatment of Enemy Property," by Mr. Gearhart, author of one of the pending Congressional bills, is indicative of a point of view in Congressional circles—whether it is to be the eventually prevailing view remains to be seen.

E. R. LATTY.

WESTERN HEMISPHERE CONTROL OVER ENEMY PROPERTY: A COMPARATIVE SURVEY

MARTIN DOMKE*

Measures which have been taken for the administration of alien property in wartime must be considered from the viewpoint of an economic warfare which has wholly changed from the experience of World War I. Economic warfare had been waged in the Western Hemisphere by the Axis powers long before diplomatic relations between the American Republics and the Axis were severed. Countermeasures were enacted in most of the American Republics when it became evident that Germany had long prepared systematically to loot the European countries which it invaded in 1940. Germany tried to send over here foreign currency and securities which it found hoarded in Western Europe, and to use them in the countries of the Western Hemisphere for various purposes of espionage and fifth column activities. It tried to do more, namely to use the assets abroad which belonged to residents of the invaded European territories. Such assets located within the Western Hemisphere were not to be returned to Europe; on the contrary, they had to be used here in order to foster subversive activity within the various American countries in favor of the Axis powers. At the same time other techniques of waging economic warfare were developed by the Axis in the Western Hemisphere. This included the use of business firms (e.g., I. G. Farben, Siemens & Halske, German banks acting as Nazi party financial backers, etc.) directed to the purpose of world domination. The effort has not ceased. Said the United States Department of State recently:[1] "In anticipation of impending defeat, the enemy is increasing these activities in order to salvage his assets and to perpetuate his economic influence abroad and his power and ability to plan future aggrandizement and world domination."

Countermeasures had to be introduced in this Hemisphere. They are generally known as the blocking of foreign assets by the so-called freezing regulations. Further restrictions have been placed on the import and export of foreign currency and securities. The blacklisting system is another means of waging economic warfare.

* Dr. Jur., 1915, University of Greifswald, Germany. Legal Research Director, American Arbitration Association. Author of books and monographs on economic emergency legislation, especially foreign exchange control, and of TRADING WITH THE ENEMY IN WORLD WAR II (New York, 1943; forthcoming supplement as of April 1, 1945). Contributor of articles on international law in American and foreign legal periodicals.

[1] (1944) 11 DEP'T OF STATE BULL. 383.

Finally, administration of enemy and enemy controlled property through supervision of management (and other intervention) and liquidation of seized assets by different means of expropriation and nationalization are some of the legislative and administrative measures which were enacted in the countries of the Western Hemisphere to counterbalance the effects of the Axis' economic warfare.

I

When Germany invaded Western Europe in the spring of 1940, the only country of the Western Hemisphere which had already enacted measures against this Axis power was Canada, at war with Germany since September, 1939. The Trading with the Enemy legislation of September 5, 1939,[2] was applied to the assets belonging to residents in territories occupied by Germany, in ordering "the protective custody of property of persons residing in proscribed territory."[3] The United States reacted to the prospective use of looted assets with a measure which might not have been foreseen by the invader: it blocked immediately, on April 10, 1940,[4] all assets belonging to residents of the occupied countries to nullify "attempts by the Axis to gain title to the billions of dollars in assets belonging to nationals of the countries overrun by the Axis."[5] At the Havana Conference of the American Republics held in July, 1940, it was agreed that each of the governments should take the necessary measures to suppress activities inspired by foreign governments or by foreign nationals which might subvert the democratic institutions of any of the Republics.[6] Some of the Latin-American Republics followed the example of the United States in enacting freezing regulations against Germany's use of assets of invaded countries, e.g., Argentina, Brazil, Colombia, Costa Rica, Paraguay, Uruguay, and Venezuela.[7] The effectiveness of such measures, however, might sometimes be considered doubtful, as, for instance, the freezing regulations introduced in Argentina as early as April, 1940.

When Germany undertook new aggressions in the spring of 1941 against the Balkans, and later against Russia, the freezing regulations of the United States were extended to the assets of nearly all European countries on June 14, 1941[8] and

[2] Regulations Respecting Trading with the Enemy (1939), established by Order in Council, P. C. 2512, were replaced by the Consolidated Regulations, P. C. 3959, as amended, in turn replaced by the Revised Regulations Respecting Trading with the Enemy (1943), Order in Council of November 13, 1943, P. C. 8526, C. C. H. 1943, War Law Serv. (Foreign Supplement) ¶65,612.

[3] May 11, 1940, Order in Council, P. C. 1936, 2 PROCLAMATIONS AND ORDERS IN COUNCIL 85 (1940).

[4] EXEC. ORDER No. 8389, 5 FED. REG. 1400 (1940), as amended; C. C. H. 1942, War Law Serv. (Statutes, Proclamations, Interpretations) ¶14,011. For amendments and further regulations see U. S. TREAS. DEP'T, ADMINISTRATION OF THE WARTIME FINANCIAL AND PROPERTY CONTROLS OF THE UNITED STATES GOVERNMENT (Dec., 1942); U. S. TREAS. DEP'T, DOCUMENTS PERTAINING TO FOREIGN FUNDS CONTROL (March 30, 1944). The latter will be hereinafter cited as "DOCUMENTS."

[5] Treas. Dept's Press Release No. 34, April 21, 1942, DOCUMENTS, *supra* footnote 4, at 122; C. C. H. *op. cit. supra* footnote 4, at ¶14,633.

[6] (1941) 35 AMER. J. OF INT. L., SUPP. 10.

[7] PAN AMERICAN UNION, PROCEEDINGS OF THE INTER-AMERICAN CONFERENCE ON SYSTEMS OF ECONOMIC AND FINANCIAL CONTROL (Congress and Conference Series No. 40, 1942) 12, 17, 22, 37, 39, 45.

[8] EXEC. ORDER No. 8785, 6 FED. REG. 2897 (1941).

on July 26, 1941;[9] when Japan overran Indo-China, the control was invoked against Japan and China. In the same way, Canada extended its Trading with the Enemy legislation to apply to all countries occupied by the Axis powers as "proscribed territories."[10]

On July 17, 1941, the United States issued the Proclaimed List of Certain Blocked Nationals, known as the blacklist, which was officially recognized or used as a basis for local controls by some of the Latin-American Republics.[11]

After Pearl Harbor, the declarations of war by the United States were immediately followed by nine American Republics, while other countries broke off diplomatic relations with the Axis powers in December, 1941, or shortly after the Third Meeting of the Ministers of Foreign Affairs of the American Republics, held in Rio de Janeiro on January 15, 1942.[12] A Resolution adopted at that meeting recommended that the American Republics "cut off for the duration of the present hemispheric emergency all commercial and financial intercourse, direct or indirect, between the Western Hemisphere and the nations signatory to the Tripartite Pact and the territories dominated by them."[13] It further provided for the supervision of all transactions of aliens of enemy nationality who are residents in the American Republics, and for a conference of representatives of the central banks of all Republics to draft standards of procedure for the uniform handling of all transactions of "real or juridical persons who are nationals of a state which has committed an act of aggression against the American Continent."[14] Accordingly, the Inter-American Conference on Systems of Economic and Financial Control was held in Washington in June-July, 1942. The Final Act of July 10, 1942,[15] recommended measures to be adopted by each country for the elimination of Axis influence. Of special interest is the seventh recommendation regarding control of business enterprises. It aims at a policy under which "in accordance with the constitutional procedure of each country, all necessary measures be adopted as soon as possible, in order to eliminate from the commercial, agricultural, industrial and financial life of the American Republics, all influence of governments, nations, and persons within such nations who, through natural or juridical persons or by any other means are, in the opinion of the respective government, acting against the political and economic independence or security of such Republics."[16] By this literal language, conceivably every foreign influence, not only that emanating from enemy nationals,

[9] Exec. Order No. 8832, 6 Fed. Reg. 8786 (1941); see Press Release No. 7, C. C. H. *op. cit. supra* footnote 4, at ¶14,607, Documents, *supra* footnote 4, at 106.

[10] Orders in Council: of March 4, 1941 (P. C. 1561, 1562: Bulgaria, Hungary); of December 7, 1941 (P. C. 9590: the Japanese Empire and Japanese occupied and/or controlled territory).

[11] See *infra* footnotes 69-77.

[12] See the tabulations in (1944) 10 Dep't of State Bull. 373, 413, and (1945) 79 Bull. of the Pan American Union 31.

[13] (1942) 36 Amer. J. of Int. L., Supp. 71. [14] *Id.*, at 72.

[15] (1943) 37 Amer. J. of Int. L., Supp. 9; cf. Manuel Felix Maúrtua, *Consideraciones al margen de la Conferencia de Control Económico* (1942) 2 Revista Peruana de Derecho Internacional 422.

[16] (1943) 37 Amer. J. Int. L., Supp. 18.

might thus be eliminated through blocking of assets and other forms of control. The nationalistic tendency of such measures appears further from this recommendation: "The alienation, in any form, of the said properties and rights can only be made to nationals of the respective country or to juridical persons formed by them."[17]

Thus, the administration of alien property in Latin-American Republics will have far-reaching consequences, beyond the temporary elimination of Axis influence from wartime economy. These resolutions which were adopted with reservations both by Argentina and Chile,[18] were carried into execution in a variety of ways (and degrees of effectiveness) through legislative and administrative measures in the American Republics.

II

For the purpose of administration of enemy property it is necessary to determine which individuals and corporations have to be considered enemies. They are the nationals of enemy countries who are residing within enemy territory, and corporations registered under enemy law. Nationals like Americans living in enemy or enemy-occupied territory have also been considered enemies within the meaning of the Trading with the Enemy legislation during both World Wars.[19] The territorial test is a decisive one; who stays in enemy territory is deemed to help the enemy economy.[20]

On the other hand, aliens of enemy nationality who are residing in countries of the Western Hemisphere are generally not restricted in their financial and commercial transactions. Such alien enemies when they have been residents of the United States since February 23, 1942,[21] are so-called generally licensed nationals of a foreign (blocked) country who are subject to practically no financial restrictions. The situation, though similar in Canada,[22] is different in some Latin-American Republics. There the so-called nationality test prevails. The resident of enemy nationality is subject to almost the same restrictions which are applied to assets belonging to enemy nationals residing abroad. This is the case, for instance, in Brazil,[23] Colom-

[17] *Id.*, at 19.

[18] *Id.*, at 20.

[19] As to cases, see DOMKE, TRADING WITH THE ENEMY IN WORLD WAR II (New York, 1943) 26.

[20] This territorial test has been adopted in the Rumanian, Bulgarian, Finnish and Hungarian Armistices. They provide for the control of alien property belonging "to Germany, Hungary or to their citizens, or to persons residing on their territory, or on territory occupied by them." Art. 8, Rumanian Armistice of September 12, 1944, (1944) 11 DEP'T OF STATE BULL. 289; Art. 13, Bulgarian Armistice of Oct. 28, 1944, *id.*, at 492; Art. 16, Finnish Armistice of September 19, 1944, New York Times, September 21, 1944, p. 12, col. 2; Art. 8 of Hungarian Armistice of Jan. 20, 1945, N. Y. Times, Jan. 22, 1945, p. 4, col. 2.

[21] Treas. Dep't, General License No. 42, as amended, 7 FED. REG. 1492 (1942); cf. General Ruling No. 11, as amended June 30, 1944, 9 FED. REG. 7379 (1944), DOCUMENTS, *supra* note 4, at 34.

[22] See Trefnicek v. Martin [1939] 4 D. L. R. 737; J. G. White Engineering Corp. v. Canadian Car & Foundry Co. [1940] 4 D. L. R. 812.

[23] Brazil: Decree-law No. 4166, March 11, 1942, PAN AMERICAN UNION, *op. cit. supra* footnote 7, at 18.

bia,[24] Guatemala,[25] Haiti,[26] Mexico,[27] and Peru.[28] This problem, namely to subject residents of enemy nationality to financial restrictions, becomes rather important in this war where funds within the countries of the Western Hemisphere have been used for Axis purposes and other fifth column activities. Evasion of financial wartime controls, and other inimical activities, however, are not dependent on residence, nationality, or allegiance to a foreign country. It comes down to a matter of loyalty. Thus, "the ideological and racial nature of the present war appears, in many respects, to have cut across national lines and destroyed the value of old distinctions based on nationality."[29] Under the legislation of most of the countries of the Western Hemisphere individuals and corporations acting on behalf of or for the benefit of enemy countries may be assimilated to enemies by administrative decision.[30] This happened during this war with American citizens residing within this country. They were considered acting in the interest of the enemy and determined as nationals of a foreign (Germany) country and thus blocked in their financial activity.[31]

In other respects of wartime controls the loyalty test is a decisive factor too; aliens of enemy nationality may be naturalized even during the war in the United States after their loyalty has been ascertained by investigation.[32] On the other hand, naturalized citizens might be faced with the cancellation of their certificates of citizenship by court decision when it becomes evident from their attitude favoring Axis aims that they took the oath of allegiance to their new country with mental reservations.[33] This is especially true with former members of the American-German Bund in this country.[34] Their internment after denaturalization, however, does not subject their property within the country to control as enemy property,[35] whereas in Cuba, for instance, all assets of interned citizens of countries at war with Cuba shall be vested in the Interventor for the Property of Enemy

[24] Colombia: Decree No. 915, April 9, 1942, Diario Oficial, April 17, 1942.

[25] Guatemala: Decree No. 2655, December 23, 1941, as amended, Diario de Centro América, February 24, 1942.

[26] Haiti: Decree-law No. 80, December 18, 1941, Le Moniteur, December 18, 1941.

[27] Mexico: Decree, June 13, 1942, Pan American Union, *op. cit. supra* footnote 7, at 35.

[28] Peru: Decree No. 9586, April 10, 1942, El Peruano, April 22, 1942.

[29] Note, *Alien Enemies and Japanese-Americans: A Problem of Wartime Controls* (1942) 51 Yale L. J. 1318, 1337.

[30] Treas. Dep't, Public Circular No. 18, March 30, 1942, C. C. H. *op. cit. supra* footnote 4, at ¶14,526, 7 Fed. Reg. 2503 (1942); Canada: Revised Regulations, *supra* footnote 2. For Canadian cases, see Ritcher v. King [1943] Ex. C. R. 64; *In re* Shawaga Estate [1943] 4 D. L. R. 610.

[31] Draeger Shipping Co. v. Crowley, 49 F. Supp. 215 and 55 F. Supp. 906 (S. D. N. Y. 1943, 1944); Alexewicz v. General Aniline & Film Corp., 181 Misc. 181, 43 N. Y. S. (2d) 713 (Sup. Ct. Broome County, 1943); Hartmann v. Fed. Res. Bank of Phil., 55 F. Supp. 801 (E. D. Pa., 1944).

[32] Exec. Order No. 9372, August 27, 1943, 8 Fed. Reg. 11887 (1943); naturalization of aliens of Axis nationality has been expressly prohibited in Mexico (Diario Oficial, January 24, 1942) and suspended in Argentina (Boletín Oficial, September 2, 1943).

[33] Preuss, *Denaturalization on the Ground of Disloyalty* (1942) 36 Am. Pol. Sc. Rev. 701.

[34] Among the numerous decisions rendered by Federal courts during this war, see Baumgartner v. United States, 322 U. S. 665 (1944).

[35] *Ex parte* Kumezo Kawato, 317 U. S. 69 (1942); Note (1943) 43 Col. L. Rev. 944.

Aliens.[36] On the other hand, the exemption of Italian nationals residing in this country from qualification as alien enemies[37] did not automatically release their property from the control of the Alien Property Custodian.

The loyalty test plays a decisive role in the whole field of administration of enemy property.[38] Nationals of countries of the Western Hemisphere often serve in their own countries as cloaks for Axis interests. They control, as stockholders or through management, domestic and neutral commercial enterprises in the interest of the enemy.[39] Controlling enemy interest has usually been assumed when twenty-five percent of the shares of a domestic corporation are held in the interest of enemies. Such control has often, however, been exercised through long-term credit or patent agreements within the framework of international cartelization.[40] The Axis-controlled corporation is considered an enemy for the practical purpose of administration of alien property in Canada,[41] in the United States,[42] and in some Latin-American Republics such as Brazil,[43] Costa Rica,[44] Nicaragua,[45] and Uruguay.[46] Said the recent statement of the Department of State:[47] "The enemy has also been attempting to conceal his assets by passing the chain of ownership and control through occupied and neutral countries." Thus the final liquidation of enemy-controlled corporations in the common interest of the countries of this Hemisphere will involve many legal and economic problems extending well beyond the war.[47a]

III

Perhaps the most effective measure of administration of alien property in wartime has been the one which was undertaken first, as a countermeasure against the use of assets abroad of individuals and corporations which resided in the European countries invaded by Germany in 1940. In varying degrees, the freezing regulations first introduced in Canada and in the United States in the spring of 1940 have also

[36] Cuba: Decree No. 3343, December 21, 1941, PAN AMERICAN UNION, *op. cit. supra* footnote 7, at 26.

[37] October 19, 1942, 7 FED. REG. 8247 (1942). For a similar measure in Mexico: Executive Order of April 27, 1944, Diario Oficial, April 29, 1944.

[38] For cases, see *supra* footnote 31.

[39] Domke, *Compañías Controladas por el Enemigo* (1943) 22 REVISTA DE DERECHO INTERNACIONAL 184.

[40] CORWIN D. EDWARDS, ECONOMIC AND POLITICAL ASPECTS OF INTERNATIONAL CARTELS, 78th Cong., 2d Sess., Senate Committee Print, Monograph No. 1 (1944) 62 ("A study made for the Subcommittee on War Mobilization of the Committee on Military Affairs, United States Senate, pursuant to S. Res. 107.").

[41] Canada: Revised Regulations, *supra* footnote 2, at §8.

[42] EXEC. ORDER No. 8389, as amended, §5E(ii), C. C. H. *op. cit. supra* footnote 4, at ¶14,011; ALIEN PROPERTY CUSTODIAN (FIRST) ANNUAL REPORT (1944) 22.

[43] Brazil: Resolutions No. 64 and 65, Economic Defense Commission, May 10, 1943, Diário Oficial, May 12, 1943.

[44] Costa Rica: Decree No. 52, December 26, 1941, Gaceta Oficial, December 27, 1941.

[45] Nicaragua: Presidential Decree No. 52, December 26, 1941, La Gaceta, December 27, 1941.

[46] Uruguay: Exec. Order No. 700-40, September 14, 1942, Diario Oficial, September 19, 1942.

[47] (1944) 11 DEP'T OF STATE BULL. 383.

[47a] *See* DEP'T OF STATE, UNITED NATIONS MONETARY AND FINANCIAL CONFERENCE (Pub. No. 2187, Conference Series 55, 1944) 22.

been enacted in most of the Latin-American Republics.[48] Exactly how tight are these regulations, in action as well as on paper, is not exactly known; Argentina, which introduced such measures as early as April, 1940, is a case in point.

Freezing regulations in all Latin-American Republics were facilitated through the existing foreign exchange control.[49] The central banks already controlled all foreign assets and prevented them from being used outside of the country. No longer was protection of the national currency now the main purpose of foreign exchange control. To prevent these assets from being used for Axis purposes within the country now became of primary importance.

The introduction of freezing regulations, however, encountered difficulties in some Latin-American countries. Special compensation or barter agreements with Germany existed, as, for instance, in the case of Brazil,[50] Chile,[51] and Colombia.[52] Such agreements made it impossible to cut off all commercial intercourse with the Axis powers which were debtors of the American Republics. Difficulties involved in introducing freezing regulations were further mentioned by Bolivia at the Inter-American Conference in June, 1942.[53] Special supply services in Bolivia have been operated by German firms for over forty years. These firms with a capital of about six million dollars reacted to the blocking of their funds in 1941 by restricting their imports to the eastern part of Bolivia. Thus the native population soon felt the effects of an insufficient food supply. The Bolivian government was obliged to make the blocking measures more flexible, and to allow the operation of German-owned business to a certain extent.

IV

Other measures were taken in the countries of the Western Hemisphere to prevent the Axis powers from benefiting from foreign currencies and securities looted within the occupied territories. In European countries a tax stamp had to be attached to all securities. Bonds and shares which were sent to the United States shortly after the occupation of Western Europe, though through neutral channels, were barred from import and from any dealing by banks when they bore tax stamps or evidence that stamps had been attached.[54] Even securities already in this country but in the name of neutral banks have rigorously been controlled. Any disposition requires formal declarations of these banks that the transfer will not be of any interest to a national of the Axis powers.[55]

[48] *Supra* footnotes 4-7.

[49] See Olson and Hickman, Pan American Economics (New York, 1943) 320.

[50] See U. S. Tariff Commission, Foreign-Trade and Exchange Controls in Germany (Report No. 150, Second Series, 1942) 171; Tenenbaum, National Socialism vs. International Capitalism (Yale Univ. Press, 1942) 93.

[51] Pan American Union, *op. cit. supra* footnote 7, at 21, 48.

[52] *Id.*, at 22.

[53] *Id.*, at 15.

[54] Treas. Dep't, Gen. Ruling No. 6, as amended May 18, 1943, 8 Fed. Reg. 6595 (1943), C. C. H. *op. cit. supra* footnote 4, at ¶14,206, Documents, *supra* footnote 4, at 31.

[55] Treas. Dep't. Gen. Ruling No. 17, October 20, 1943, 8 Fed. Reg. 14,341 (1943), C. C. H. *op. cit. supra* footnote 4, at ¶14,220, Documents, *supra* footnote 4, at 40.

Similar measures were provided for in Mexico by a Presidential Decree of August 4, 1942,[56] requiring the registration of Mexican government obligations and railroad securities within a certain period. All non-registered bonds would be considered as held by enemies. The New York Stock Exchange excluded unregistered Mexican bonds from being traded. Thus about sixty million dollars of Mexican bonds presumably in enemy possession were reached by this regulation. A similar measure was enacted in Guatemala,[57] which suspended the service of its four percent foreign debt pending the restamping of bonds and coupons in order to prevent them from coming into possession of persons or corporations controlled by enemy nationals.

It became further necessary to introduce a strict control of the importation of currencies into the countries of the Western Hemisphere. Dollar notes hoarded all over Europe were not allowed to enter this Hemisphere in order to prevent the building up of dollar funds or the equivalent of national currency which might be used for fifth column activity and other means of economic warfare. Nearly all the Latin-American countries followed the example of the United States which had already restricted the import of dollar notes in the spring of 1940.[58] Thus the entrance of foreign currency was prevented and controlled by different measures, as the withdrawal of all dollar notes in Brazil,[59] or the reporting of all currency in Mexico[60] and Uruguay,[61] or the obligation to change foreign currency into national currency as in Paraguay[62] and Peru.[63] Furthermore the export of currency has been controlled in almost every American Republic. Travelers were allowed to export relatively small amounts of currency.[64] Mexico made an agreement with the United States, on August 12, 1942,[65] which provided for a detailed regulation of export and import of currencies with the aim of preventing the proper disposition within the Western Hemisphere of currency looted by the Axis powers.

V

Problems reaching far beyond wartime conditions are involved in the practice of commercial blacklisting. Individuals and commercial firms mostly in neutral countries but also in territories of the United Nations who are deemed to serve

[56] As amended December 16, 1943, Diario Oficial, December 24, 1943.

[57] Guatemala: Legislative Decree No. 2766, March 30, 1944, Diario de Centro América, May 2, 1944.

[58] Treas. Dep't, Gen. Ruling No. 5, as amended September 3, 1943, 8 FED. REG. 12,286 (1943), C. C. H. *op. cit. supra* footnote 4, at ¶14,205. See Public Circular No. 14, as amended April 26, 1944, 9 FED. REG. 4462 (1944).

[59] PAN AMERICAN UNION, *op. cit. supra* footnote 7, at 19.

[60] Mexico: Regulations of December 10, 1942, Diario Oficial, December 15, 1942.

[61] Uruguay: Decree of June 18, 1942, Diario Oficial, September 11, 1942.

[62] PAN AMERICAN UNION, *op. cit. supra* footnote 7, at 39.

[63] *Id.*, at 41.

[64] Chile: September 1, 1942, El Mercurio, Santiago, September 2, 1942; Costa Rica: September 13, 1942, La Gaceta, September 17, 1942; Dominican Republic: Decree No. 343, Gaceta Oficial, November 9, 1942; Ecuador: August 12, 1942, Registro Oficial, August 17, 1942; El Salvador: October 22, 1942, Diario Oficial, October 27, 1942.

[65] Treas. Dep't, Press Release No. 39, C. C. H. *op. cit. supra* footnote 4, at ¶14,637, DOCUMENTS, *supra* footnote 4, at 127. Cf. N. Y. Times, Jan. 4, 1945, p. 30, col. 4.

Axis interests are to be treated as enemies and thus to be subject to all sanctions of economic warfare. Such persons and firms have had their assets frozen and all movements of funds have been stopped. Canada, under statutory provisions, publishes Lists of Specified Persons.[66] The United States introduced on July 17, 1941,[67] the so-called Proclaimed List of Certain Blocked Nationals. The blacklists are revised from time to time by addition of names or by deletion. Deletion is frequently the result of liquidation, transfer or "clean-up" of an enterprise; sometimes it is the result of change in policy, death, change of residence, recognition of error; mere change in the listed person's pro-Axis leanings is probably insufficient, *per se*, for deletion. Additions to the List have generally exceeded deletions, although a trend in the other direction is recently noticeable as to listings of names in the Latin Republics.[68] The fact that additions continue indicates that the control of Axis interests in neutral countries and in some of the American Republics is not all that might be desired from an anti-Axis point of view.

Some of the American Republics used the United States Proclaimed List as the basis of some local control, e.g., Bolivia,[69] Costa Rica,[70] Ecuador,[71] Guatemala,[72] and Nicaragua.[73] Mexico[74] and Cuba[75] publish from time to time names of specified individuals and of firms which are to be considered enemies. When Haiti based certain local controls on the United States blacklist long before it severed diplomatic relations with Germany,[76] the German chargé d'affaires protested to the Haitian government, claiming that it had allowed an interference of the United States in its sovereignty, a claim strongly rejected by the Haitian government.[77]

In order not to disturb any regular commercial relations of this country with the Latin-American Republics, the whole Western Hemisphere has been declared a so-called generally licensed trade area[78] with which any transaction is licensed unless it concerns a blacklisted firm or nationals of foreign (blocked) countries outside the Western Hemisphere.

[66] Canada: Revised Regulations, *supra* footnote 2, at §1(d)viii; cf. the last Revision, No. 55, Dec. 8, 1944, 4 Canadian War Orders and Regulations (1944) 486.

[67] Pres. Proc. No. 2497, 6 Fed. Reg. 3555 (1941), C. C. H. *op. cit. supra* footnote 4, at ¶14,051, (1942) 36 Amer. J. Int. L., Supp. 214.

[68] The September 1944 Revision of the U. S. Proclaimed List of Certain Blocked Nationals contained 9,915 listings in the American Republics and 5,496 in other countries. Revision VIII of September 13, 1944, 9 Fed. Reg. 11389 (1944). See Cumulative Supp. No. 5 of Jan. 12, 1945, 10 Fed. Reg. 581 (1945).

[69] Bolivia, on December 12, 1941, Pan American Union, *op. cit. supra* footnote 7, at 15.

[70] Costa Rica, on October 10, 1941, *id.*, at 24.

[71] Ecuador: Presidential Decree No. 854, June 11, 1943, Registro Oficial, June 23, 1943.

[72] Guatemala: Presidential Decree No. 3153, Oct. 6, 1944, Diario de Centro América, Oct. 7, 1944.

[73] Nicaragua: Presidential Decree No. 70, December 16, 1941, La Gaceta, December 18, 1941.

[74] Mexico: Lists of Firms and Persons included under the Provisions of the Law on Enemy Property and Business, as amended February 24, 1944, Diario Oficial, March 29, 1944.

[75] Cuba: Resolution No. 26, August 18, 1942, Gaceta Oficial, August 21, 1942, p. 15,136.

[76] Haiti, on December 29, 1941, Pan American Union, *op. cit. supra* footnote 7, at 32A.

[77] The whole correspondence is published in Le Moniteur (1941) 521, 528, 534.

[78] Treas. Dep't, Gen. License No. 53 as amended February 21, 1944, C. C. H. *op. cit. supra* footnote 4, at ¶14,358, Documents, *supra* footnote 4, at 65.

The blacklisting system, besides its legal effects in the commercial field,[79] involves economic problems for the countries eliminating Axis interests. A blacklisted firm for instance will be cut off from bank credits; imports from other countries are no longer allowed to reach it, and exports are no longer possible. How does this firm continue to operate, and what will become of its numerous employees? A committee of the Colombian Senate called attention to the injustices and injuries suffered by the businessmen of that country.[80] In Guatemala, for instance, German interests predominantly control coffee plantations.[81] The Guatemalan delegation at the Inter-American Conference, June, 1942, made the following statement: "Coffee interests are diverse: there are the interests of the owners of plantations; of the Guatemalans who work in these plantations; of the banks that furnish the credits which finance the gathering of the crops; the interests of the creditors who hold mortgages, and of the government which derives a large part of the national income from export taxes."[82] Recently the United States and Great Britain have agreed[83] that "the continuation of the Proclaimed and Statutory Lists[84] will be necessary following the cessation of organized resistance in Germany. This action is required in order to permit the Allied Governments to deal properly with firms which have been part and parcel of the Axis effort to gain world domination."

VI

The control of enemy property in the countries of the Western Hemisphere has as its major objective the cutting off of all financial and commercial transactions which might be of benefit to the Axis powers. This control has been exercised through freezing regulations, restrictions on the movement of securities and currency, severance of communications, the blacklisting system, preclusive buying of commodities, export restrictions to neutral countries, and through other measures of economic warfare.

The elimination of Axis influence and control over any part of the national economy of the Western Hemisphere will be the final aim of administration of enemy property in the various countries. To provide the information necessary for effective measures, a census of all foreign property became necessary. Such census

[79] Domke, *Some of the Legal Questions Involved in Commercial Blacklisting* (1943) 48 EXPORT TRADE AND SHIPPER, No. 12, p. 30. For a Guatemalan case, see Kellor, *Inter-American Commercial Arbitration* (1944) 78 BULL. OF THE PAN AMERICAN UNION, 218, 222, n. 5.

[80] Bidwell, *Our Economic Warfare* (1942) 20 FOREIGN AFFAIRS 421, 427.

[81] *Government Custodianship of Coffee Plantations in Guatemala* (1943) 77 BULL. OF THE PAN AMERICAN UNION 488.

[82] PAN AMERICAN UNION, *op. cit. supra* footnote 7, at 32. Guatemala levies an extraordinary war tax on exports of coffee, seed and wax from controlled plantations. Legislative Decree No. 2764, March 30, 1944, Diario de Centro América, May 2, 1944.

[83] (1944) 11 DEP'T OF STATE BULL. 340; cf. Russell, *Current and Post-War Significance of the Proclaimed List* (1944) 49 EXPORT TRADE AND SHIPPER, No. 15, p. 3; REPORT TO CONGRESS ON OPERATIONS OF THE FOREIGN ECONOMIC ADMINISTRATION (Sept. 25, 1944) 14.

[84] Published by the Board of Trade under the authority of Sec. 2 (2) of the British Trading with the Enemy Act, 1939, 2 & 3 GEO. VI, c. 89, (1942) 36 AMER. J. OF INT. L., SUPP. 3.

was required, in the United States, on September 3, 1941,[85] whereby all persons owning, holding, or controlling any type of property in which there was a foreign interest, direct or indirect, had to report the ownership of such property to the Treasury Department. Similar measures were adopted in Canada.[86] Some Latin-American Republics required the reporting of all such assets, e.g., Brazil,[87] Chile,[88] Cuba,[89] Ecuador,[90] and Mexico.[90a] Further measures to obtain necessary information were the requirements to report employees of Axis nationality in Brazil[91] and Cuba.[92]

The control, however, would not become effective were it not aimed at the elimination of all financial and commercial influence or activity of interests which have been inimical to the defense of the Western Hemisphere. Such control has been exercised through a variety of methods, viz., the supervision of commercial activities by the use of intervention by representatives of the government, by control of licensed operation of business enterprises, and through different types of regulations. In the United States there are General Orders of the Alien Property Custodian which generally have the purpose of getting information over certain classes of property, especially patents and other industrial property rights. Supervisory Orders are further used by the Alien Property Custodian especially as a flexible device to control property of residents of enemy-occupied countries.[93] A similar device, one which does not *ipso facto* vest title in the government, is usually used by central banks of some American Republics, e.g., Brazil,[94] Haiti.[95] Sometimes when more than bank experience is required, specific interventors for the supervision of enemy property have been designated, e.g., Cuba,[96] or Honduras.[97] Sometimes particular interests such as farms belonging to alien enemies are administered by special agencies as in Guatemala by the National Mortgage Credit Association[98] or in Costa Rica by the

[85] Public Circulars Nos. 4 and 5, 6 Fed. Reg. 4196, 4587 (1941).

[86] Canada: Revised Regulations, *supra* footnote 2, at sec. 28.

[87] Brazil: Resolution No. 50—1943, Economic Defense Commission, April 12, 1943, Diário Oficial, April 13, 1943.

[88] Chile: Presidential Decree No. 422, January 20, 1944, Diario Oficial, January 22, 1944.

[89] Cuba: Presidential Decree No. 588, February 29, 1944, Gaceta Oficial, March 15, 1944, p. 4163.

[90] Ecuador: Decree No. 171, February 9, 1942, Pan American Union, *op. cit. supra* footnote 7, at 29.

[90a] Mexico: Decree of April 25, 1944, Diario Oficial, July 13, 1944.

[91] Brazil: Decree-law No. 5576, June 14, 1943, Diário Oficial, June 15, 1943.

[92] Cuba: Order No. 3, Office of the Interventor for the Property of Enemy Aliens, March 19, 1943, Gaceta Oficial, March 20, 1943, p. 4654.

[93] Alien Property Custodian (First) Annual Report (1944) 19; cf. Canada: Revised Regulations, *supra* footnote 2, at §21.

[94] Brazil: Decree-law No. 6393, Boletim Aéreo No. 292, Secção de Informações, Ministério das Relações Exteriores (April 6, 1944).

[95] National Bank appointed Sequestrator-Liquidator General of Enemy Properties, Annual Report of the Fiscal Department, Banque Nationale de la République d'Haiti (1942) 36.

[96] Pan American Union, *op. cit. supra* footnote 7, at 26.

[97] *Id.*, at 33.

[98] Guatemala: Presidential Decree No. 2841, July 17, 1942, Diario de Centro América, July 24, 1942.

Agricultural Industrial Production Cooperative.[99] It seems, however, that more and more in all American Republics a centralized control is exercised, as through the Custodian (Department of the Secretary of the State) in Canada, the Alien Property Custodian in the United States, and in some of the Latin-American Republics through central agencies like the Board of Economic Defense in Bolivia, the Economic Defense Commission in Brazil, the National Economic Defense Commission in Colombia, the Alien Property Custodian Board in Costa Rica, the Interventor for the Property of Enemy Aliens in Cuba, the Office for the Control of Blocked Properties in Ecuador, the Special Board of Control of Foreign Funds in Honduras, the Inter-Departmental Board on Enemy Property and Business in Mexico, the Advisory Committee on Alien Property in Nicaragua, and the Alien Property Custodian Commission in Venezuela.

VII

The most important type of administration of enemy-controlled property is its transfer to the government of the country where it is located. Thus in the United States, the Alien Property Custodian has issued more than four thousand Vesting Orders by which the Custodian as a representative of the United States government took absolute title to the specified foreign-owned property.[100] Thus most of the ennemy interests in business enterprises and in industrial property rights were effectively subjected to government control. The control of enemy property may not be effectively pursued if the enemy influence on the national economy of the Republic will not be definitely removed. Such final disposition of enemy property will be most adequately effected when enemy properties are not only put under national management or vested in the government, but definitely transferred into private ownership and thus incorporated into the national economy of the Western Hemisphere.

The nationalization of enemy property becomes of primary importance and more or less the final aim of its administration.[101] Assets now held by the Alien Property Custodian are disposed of in this country, through public bidding. They will be sold, however, only to American citizens or organizations controlled by American citizens not on the Proclaimed List of Certain Blocked Nationals. Bids should be accompanied by an affidavit that the bidder is not purchasing on behalf of an undisclosed principal, a person not a citizen of the United States, or for resale to a non-citizen.[102] Similar provisions for sale of enemy property in public auctions

[99] Costa Rica: Legislative Decree No. 49, July 22, 1943, La Gaceta, July 23, 1943.

[100] See opinion of the General Counsel of the Alien Property Custodian (1943) 57 U. S. PATENT QUARTERLY, 202.

[101] The recent development has been illustrated in an article by the U. S. Alien Property Custodian James E. Markham, *Making Enemy Money Fight for Us* (October, 1944) 138 AMERICAN MAGAZINE (No. 4) 24.

[102] See Form APC-43, C. C. H. *op. cit. supra* footnote 4, at ¶7522; General Order No. 26 of May 29, 1943, 8 FED. REG. 7628 (1943).

are provided for in Brazil,[103] Colombia,[104] Costa Rica,[105] Haiti,[106] and Peru.[107]

Enemy property is disposed of in the different American Republics in various ways. No uniformity of administration exists, and it seems to be immaterial what the act of disposition of enemy property is called. The seizure and disposition of enemy property under the legislation of the respective countries is sometimes called custodianship[108] or fiduciary administration,[109] sometimes liquidation[110] or expropriation,[111] sometimes confiscation[112] or nationalization.[113] No final determination on vested enemy property or on the proceeds of its liquidation has been made for instance in Canada,[114] nor as yet in the United States by Congress.[115] In Mexico a law of January 17, 1943[116] provides that the final disposition of enemy properties will be determined in peace treaties. Sometimes as in Costa Rica,[117] or in Venezuela[118] special regulations have been prescribed for the evaluation and indemnification of seized Axis-controlled property.

Sometimes the proceeds of disposed enemy property are to be deposited in the central bank of the Republic as in Chile,[119] Haiti,[120] or Mexico.[121] Sometimes it has been provided that such proceeds are to be invested in national securities as in Ecuador,[121a] Nicaragua,[122] or in Peru.[123] Sometimes as in Colombia[124] a fiduciary administration of enemy property shall be maintained "until reparation has been

[103] Brazil: Resolution No. 82, Economic Defense Commission, June 28, 1943, Diário Oficial, June 30, 1943.

[104] Colombia: Presidential Decree No. 2605, December 24, 1943, Diario Oficial, January 5, 1944.

[105] Costa Rica: Presidential Decree No. 21, April 16, 1943, La Gaceta, April 20, 1943.

[106] Haiti: Decree of February 11, 1943. Haiti-Journal, February 12, 1943.

[107] Peru: Supreme Decree of March 20, 1943, El Comercio, March 22, 1943.

[108] Paraguay: Presidential Decree of September 27, 1943, El País, Asunción, October 1, 1943.

[109] Colombia: Presidential Decree No. 2622, December 29, 1943, Diario Oficial, December 30, 1943.

[110] Brazil: Resolution No. 78, Economic Defense Commission, June 16, 1943, Diário Oficial, June 21, 1943. Chile: Presidential Decree No. 402, January 19, 1944, Diario Oficial, January 22, 1944.

[111] Bolivia: Decree of February 9, 1944, El Diario, February 12, 1944; Guatemala: Presidential Decree No. 3115, June 22, 1944, Diario de Centro América, June 23, 1944; Nicaragua: Law of August 6, 1943, N. Y. Times, August 7, 1943, p. 4, col. 6; Peru: Law No. 9958 of July 1, 1944, El Peruano, July 17, 1944.

[112] Costa Rica: Legislative Decree No. 49, December 28, 1943, La Gaceta, January 4, 1944.

[113] Haiti: Executive Decree No. 365, March 28, 1944, Le Moniteur, March 30, 1944.

[114] The Canadian Revised Regulations, *supra* footnote 2, contain no provision similar to Sec. 7(1) of the British Act, *supra* footnote 84, which provides for the appointment of custodians with a view of "preserving enemy property in contemplation of arrangements to be made at the conclusion of peace."

[115] *See, Hearings before Subcommittee No. 1 of the Committee on the Judiciary on H. R. 4840*, 78th Cong., 2d Sess., Serial No. 18 (1944, "Administration of Alien Property"). H. R. 4840 was amended and reintroduced as H. R. 5031.

[116] See Diario Oficial, February 10, 1944.

[117] Costa Rica: Presidential Decree No. 32, May 7, 1943, La Gaceta, May 9, 1943.

[118] Venezuela: Presidential Decree No. 246, November 13, 1943, Gaceta Oficial, November 13, 1943.

[119] Chile: Presidential Decree No. 427, January 20, 1944, Diario Oficial, January 22, 1944.

[120] Haiti: Executive Decree No. 365, March 28, 1944, Le Moniteur, March 30, 1944.

[121] Mexico: Law on Enemy Property and Business, as amended February 24, 1944, Diario Oficial, March 29, 1944.

[121a] Ecuador: Presidential Decree of July 5, 1944, El Comercio, Quito, July 6, 1944.

[122] Nicaragua: Law of August 6, 1943, N. Y. Times, August 7, 1943, p. 4, col. 6.

[123] Peru: N. Y. Times, January 24, 1944, p. 3, col. 7.

[124] Colombia: Presidential Decree No. 2622, December 29, 1943, Diario Oficial, December 30, 1943.

made for all damages inflicted on the Colombian nation or its citizens by the German nation or its citizens."[125]

The general aim of administration of enemy property in nearly all countries of the Western Hemisphere is to eliminate definitely Axis influence from any substantial power in the national economy. Certain assets are to be incorporated into the national domain. Divergent interests of the different countries, however, should not exclude a Western Hemisphere solution for the final disposition of enemy-controlled property. Moreover, international measures will become necessary when creditors of former owners of vested or liquidated enemy property try to get satisfaction out of the proceeds in whatever country they may be located. The disposition of enemy property thus becomes subject to more or less uniform solutions. They should soon be provided for in the common interest of the countries of the Western Hemisphere.[126]

[125] Cf. the Cuban Presidential Decree No. 587, of February 29, 1944, authorizing the formation of a "Unión de Proprietarios damnificados por la acción del Eje" (Union of Property Owners Damaged by Enemy Action), Gaceta Oficial, March 15, 1944, p. 4161.

[126] For a recent suggestion as to unification of administrative practices, *see* Meyer, *Co-ordination of Allied Enemy Property Developments* (1944) 26 J. OF COMP. LEGIS. 51.

THE CONTROL OF FOREIGN FUNDS BY THE UNITED STATES TREASURY

WILLIAM HARVEY REEVES*

> Finance is not dramatic. Its obvious use and function in industry appear its only use and function. Finance is impersonal; it will serve any master and will organize with equal facility production of the comforts of peace or the sinews of war. Finance is not concerned with morals; it supplies the goods and services desired, regardless of intended use; whatever is wanted may be had at a price.

Time was when men of good will believed that finance—international finance—could lead only to international peace. Its very operations would bind men and nations closer and closer into a unified, necessarily-cooperating, world-wide economic system, each part so dependent on every other that no nation would dare jeopardize its own welfare by disrupting, through war, the delicate balance.[1] This idea, too, had the sanction of classical economics.[2] When this dream of peace vanished in the chaos of World War I, an ideal was damaged but not wholly lost. For world reconstruction, international finance was again tried as a medium to bind together the shattered and broken countries, that each might be restored to a proper productive place in the society of nations; and as nations threatened to collapse, more financing was offered as the cure to avert the consequences for the benefit of all. With world-wide approbation the United States took a leading role in these financial plans. Now it is popularly said that the democracies through finance and resulting international trade unwittingly armed the aggressors to wage war against them.

* A.B., 1919, A.M., 1919, University of Pennsylvania; LL.B., 1925, Columbia University. Member of the New York Bar. Sometime Lecturer, School of Business, Columbia University.

[1] NORMAN ANGELL, THE GREAT ILLUSION (New York, 1910), see particularly Chapters iii, "The Great Illusion," and iv, "The Impossibility of Confiscation"; DAVID STARR JORDAN, UNSEEN EMPIRE (Boston, 1912); DAVID STARR JORDAN, WAR AND WASTE (New York, 1913) 251-252: "What shall we say of Pearl Harbor, our new stronghold of the sea? . . . Once in a century a nation can fight as Japan fought in Manchuria [1904-5]. That was the last time. Before the next century comes, the combined work of commerce, civilization and finance will put an end to international struggles." (From 23rd essay, "Pearl Harbor.")

[2] JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY (Ashley ed.) Book III, Chapter xvii, 582: "Finally, commerce first taught nations to see with goodwill the wealth and prosperity of one another. . . . It is commerce which is rapidly rendering war obsolete . . . and it may be said without exaggeration that the great extent and rapid increase of international trade, in being the principal guarantee of the peace of the world, is the great permanent security for the uninterrupted progress of the ideas, the institutions and the character of the human race."

With the advent in Germany of National Socialism, fanatical yet competent men closely examined all elements of their situation and exploited every item of that confused and depressed time to prepare for accomplishment in the future of what had not been accomplished by a war of the past. World hegemony was the reason and justification of Nazism. Financial control was to be both means and result of this accomplishment.

The purposeful diversion of financial resources to war production is now recognized. It is less well understood that international finance also became in the hands of the Axis a new and different weapon; a subtle and secret weapon to stultify and make impotent the intended national victims before the dramatic entry of the armed forces.

To counter alien national financial policy, aggressively waged, domestic financial control is necessary. The United States Treasury exercised this domestic control over foreign funds; first for their protection, later for national defense, then for economic warfare.

How Did Germany Become Possessed of Financial Power and How Was It Used?

The financial position of Germany at the beginning of World War II was the result of many factors.

Reparations.—In 1918 Germany was a defeated and disorganized nation. But the war had not been fought on German soil. Physical destruction in the Fatherland was relatively absent. Other nations had suffered the damage, and reparations were imposed on Germany. "Complete information showing the total amount of reparations that Germany has paid under the Treaty of Versailles to the creditor governments is not available as no complete accounting was made on the reparation payments made prior to the adoption of the Dawes Plan on September 1, 1924."[3] For assistance of Germany in the debt funding agreement then entered into, bonds in the principal amount of 228 millions[4] of dollars were provided, of which 110 millions were issued in the United States, the rest in other countries. At the beginning of this war almost 60 millions of the dollar bonds were still outstanding and unpaid[5] although it is believed that most of them were repatriated to Germany before World War II.[6] A new plan for reparation payment, the Young Plan, superseded and was imposed upon the Dawes Plan on May 17, 1930. Under the Young

[3] "Memorandum covering the World War indebtedness of foreign governments to the United States (1917-1921), and showing the total amounts paid by Germany under the Dawes and Young Plans" (U. S. Treasury Department, Fiscal Service, Bureau of Accounts, Revised July 1, 1941) 34.

[4] The bonds which were issued and sold outside the United States were payable respectively in the currency of the country where issued. The figure given is the dollar face value of the total. BANK FOR INTERNATIONAL SETTLEMENT, FIRST ANNUAL REPORT (1931).

[5] FOREIGN BONDHOLDERS PROTECTIVE COUNCIL, INC., ANNUAL REPORT (1940) 44.

[6] Paul D. Dickens, *Status of United States Investment in Foreign Dollar Bonds, end of 1940*, FOREIGN COMMERCE WEEKLY, July 19, 1941, p. 3 *et seq.*

Plan, bonds in the principal amount of 351 millions[7] of dollars were issued; of these about 98 millions were dollar bonds. At the commencement of this war 91 millions of the dollar bonds were unpaid and outstanding but a majority of these likewise had been repatriated before the war.[8]

All reparations by Germany, whether in delivery of material or by international payment, ceased short of their goal, and bonds given for money borrowed were defaulted before maturity. In whatever way figures illustrative of the reparation story may be compiled and refined, it seems clear that at least after 1924, because of financial assistance rendered to Germany, obligations for reparations and reparation financing were not a serious drain on German economy.[9]

Internal Debt.—The accumulated internal debt of Germany, heavily increased by war financing, was to all practical purposes extinguished by the monetary inflation of 1923-4.

Municipal and Corporate Financing.—Between 1920 and 1933, about 125 municipal and industrial bond issues were floated in the United States for use in Germany. These aggregated well over one billion dollars.[10] The funds from this financing were conventionally used for the purposes for which borrowed: state and provincial projects, municipal improvements, housing projects, rehabilitation of public utilities, capital expansion and replacement of equipment, for shipping, steel making and other industries. The bonds were serviced until 1933, then defaulted, though certain offers of compromise were made. At the beginning of this war, there were over a half billion dollars face amount of these bonds outstanding and unpaid.[11] It is estimated[12] that probably four-fifths of them have been repatriated to Germany at huge discount.

Short-Term Trade Financing.—German industries discounted to American banks vast amounts of short-term credit instruments. The amount of this negotiable paper held by the American banks attained the figure of 350 millions of dollars.[13] In 1932, the American bankers, who believed that they had invested in short-term, self-liquidating credits, found instead that they held long-term loans of doubtful collectibility. Through the standstill agreements entered into in 1932, the form of this loan was retained, but a slow liquidation was contemplated. At the commencement of the war, it is estimated that probably not more than 40 millions of dollars of this obligation in the form of time bills were still held by American banks.[14] The

[7] (Face Value in Dollars), BANK FOR INTERNATIONAL SETTLEMENTS, FIRST ANNUAL REPORT (1931).

[8] Dickens, *supra* note 6.

[9] J. B. CONDLIFFE, THE INTERNATIONAL ECONOMIC OUTLOOK (New York, 1944) 17.

[10] U. S. DEP'T OF COMM., AMERICAN UNDERWRITING OF GERMAN SECURITIES (Trade Information Bulletin No. 648, 1929) 6.

[11] FOREIGN BONDHOLDERS PROTECTIVE COUNCIL, INC., ANNUAL REPORT (1940) 45, 46, 70.

[12] Dickens, *supra* note 6.

[13] U. S. DEP'T OF COMM., BALANCE OF INTERNATIONAL PAYMENTS OF THE UNITED STATES IN 1933 (Trade Information Bulletin No. 819, 1934) 83.

[14] U. S. DEP'T OF COMM., BALANCE OF INTERNATIONAL PAYMENTS, 1939 (Economic Series No. 8, 1940) 82.

rest had been liquidated by part payment and compromise, the banks over the several year period, having made the best bargain they could with debtors who could not be forced to pay.[15]

Depression.—German trade and industry were naturally affected by the world-wide depression beginning in 1929. However, even earlier than that German engineers and industrialists had begun to fear an overproduction. The period of preparing to produce was over, in their opinion, and unemployment threatened. Germany's rehabilitated industries could produce, but could they market what they produced? Increased governmental control of output, allocation of markets . . . in short, a more effective government-controlled cartel system was demanded.[16]

The depression gave the impetus to the Nazi Party. Its governmental controls were ready, and Germany, with her industries, was ready to accept National Socialism. Thereafter, there was but little unemployment in Germany . . . the factories produced at full capacity. Foreign trade was carried on to create foreign credits where needed. But it was production and trade not primarily for immediate prosperity and profit . . . it was production for a final and ulterior purpose, to prepare the Reich for future dominance.[17] This was the final use of all the accumulated financial resources.[18]

Munich.—The sequence of ominous events in Africa, Asia, and Europe from 1933 to 1938 need not be detailed. In 1938, after various demands and threats by Germany, came the agreement of Munich. This agreement was unilaterally enlarged by Germany, and the whole of Czechoslovakia was dominated. The world marveled at the military organization, the swiftness and might of the Panzer divisions. But gradually it became apparent that the invasion of Czechoslovakia in the first instance was not by the army. Before the occupation of Prague by the German army, key industries, including banks, had already become dominated by German finance. A corps of German officials was immediately ready to take over control; gold and securities were seized; exchange transactions were cleared through German-controlled banks; and literally in no time at all Germany had absorbed the immediately convertible wealth of Czechoslovakia and had turned the agriculture and industry of the country into an annex of the German economy.[19]

[15] U. S. DEP'T OF COMM., BALANCE OF INTERNATIONAL PAYMENTS, 1937 (Economic Series No. 3, 1938) 90.

[16] See speech by E. Schmalenbach in translation, in Journal of Commerce, New York, September 11, 15, 17 and 19, 1928, reprinted from original in Vossische Zeitung.

[17] Norman Crump, *Economics of the Third Reich* (1939) 102 J. ROYAL STAT. SOC. 167-198. Throughout the period of rehabilitation capital industries were expanded disproportionately to consumer industries.

[18] Germany also defaulted her obligations in other countries and creditors of various nations participated in the standstill agreements.

[19] Demaree Bess, *Nazi Germany's First Colony*, THE SATURDAY EVENING POST, Aug. 26, 1939, pp. 23, 46 *et seq.* For discussion of financial controls exerted by Germany on neighboring countries, see Crump, *op. cit. supra* note 17; for financial organization by Germany of conquered countries, see SHIELA GRANT DUFF, A GERMAN PROTECTORATE, THE CZECHS UNDER NAZI RULE (Macmillan, London, 1942) at 132-135; for German-controlled industry outside of the Reich, see Edward H. Levi, *International Cartels and the War*, in WAR AND THE LAW (University of Chicago Press, 1944).

Further expansion of the German Reich precipitated war and in the confusion which inevitably occurred, the pattern of industrial absorption of the countries successively occupied is somewhat less clear. But accounts continuously appearing in the public press all indicate the same financial preparation and use.

INCEPTION OF FOREIGN FUNDS CONTROL

On April 8, 1940, Germany invaded Denmark and Norway. The United States was neutral. It had not been a party to the Munich agreement. It had taken no official position in regard to the absorption of Czechoslovakia and the subjugation of Poland. It had remained watchful but hopefully waiting during that strange period of ominous quiet of the winter of 1939-40, the period of the "phony war." The spring of 1940 dispelled doubts as to Germany's immediate intention and of its power to carry out its objectives. This scheme of expansion by widening conquest, now more clearly evident, caused the United States grave concern.

In 1940 the United States was a storehouse of treasure for the world. From 1933 on, there had been a gradual shifting of credit and investment to this country. Various reasons may be suggested, but important among them was the desire of the oppressed people within Germany and later of inhabitants in neighboring countries to put their property in a place of safety. Securities and deposits had come in large quantities. Toward the last, gold and credits of governments and central banks had flowed here. In this regard the United States was at the moment something like the trustee of the patrimony of various endangered European nations. The property had been placed in the United States "out of confidence in our strength and fairness."[20]

Conquest, as an instrument of national policy, had been renounced by the United States.[21] It could not supinely permit a conquering nation to absorb those financial assets of the conquered country placed within the United States' keeping, yet protest it had not recognized the conquest of the country. Nor could this government refuse to protect American financial institutions from possible adverse claims which might arise from the conquest.[22]

Publication of the Executive Order.—The President, on April 10, 1940, issued Executive Order No. 8389, commonly called the "freezing order."[23] This action,

[20] Address of Edward H. Foley, Jr., General Counsel for the Treasury Department, "Freezing Control as a Weapon of Economic Defense," 64th Annual Meeting of the American Bar Association, Indianapolis, Ind., September 29, 1941.

[21] See "Treaty for the Renunciation of War as an Instrument of National Policy" (the Kellogg Pact), 1 U. S. DEP'T OF STATE, FOREIGN RELATIONS OF THE UNITED STATES (1928) 153 ff.

[22] Senate debates on Joint Resolution of May 7, 1940—"Mr. Barkley. It should also be stated . . . that the joint resolution is intended not only to protect the nationals of Norway and Denmark who have interest in stocks, securities and other property in the United States, but it is also intended to protect American citizens in the event they have any claims of any sort growing out of these transactions and therefore we preserve the property not only for its owners but for the benefit of Americans who may have claims." "Mr. Wagner. Yes, we are also protecting the banks who may be called upon to make transfers of securities." 86 CONG. REC. 5006 (1940).

[23] 5 FED. REG. 1400 (1940). The Executive Order, and the regulations, general rulings, circulars,

taken under Section 5(b) of the Trading with the Enemy Act, as amended,[24] was promptly ratified by Congress.[25] In brief, the Order prohibited transactions relating to property of Denmark and Norway and their nationals unless permitted under license by the Secretary of the Treasury. Immediately after the issuance of the Order, the Foreign Funds Control was set up as the administrative agency within the Treasury Department.

In issuing the Executive Order the President had stressed the intention not to permit property in the United States of Denmark or Norway to be part of the fruits of Germany's conquest. That this was also the view of the Congress when it amended the Act and ratified the Order is clear.[26] The freezing order was one to protect the property within the United States of friendly aliens and thus confirm "an international belief and an international faith in the integrity of the United States government, that it will protect and safeguard and secure the property even of aliens that is legally and lawfully in the United States."[27] Yet to some in 1940 even this first freezing order for the protection of property of those nations and their nationals overwhelmed by war was considered a dangerous act of altruism in a matter in which the United States, they thought, had no real interest. They could not foresee the events to come.

Extension of Freezing to Other Countries of Europe.—Events moved quickly in Europe from April 8, 1940 and as each country was invaded that country was frozen by amendment to the Order: May 10, 1940—the Netherlands, Belgium, and Luxembourg; June 17—France (including Monaco); July 10—Latvia, Esthonia, and Lithuania; October 9—Rumania; March 4, 1941—Bulgaria; March 13—Hungary; March 24—Yugoslavia; April 28—Greece. Of these countries only Rumania, Bulgaria, and Hungary were to become enemies of the United States.

The position of the United States was becoming increasingly difficult for, as each country was conquered, the wealth of that country within the United States became an added international obligation. Ambulatory foreign capital seeking temporary investment or safe custody may even in normal times create problems within the country of its host. Had the Foreign Funds Control not been functioning, these alien funds might well have become a source of international embarrassment.

---

and other public documents issued by the Secretary of the Treasury under the Trading with the Enemy Act, frequently are collectively referred to as the "freezing regulations." The Treasury has published from time to time a useful pamphlet entitled "Documents Pertaining to Foreign Funds Control" which contains the current versions of the documents and selected press releases. The latest compilation, issued on March 30, 1944, will be cited hereafter as "DOCUMENTS." The public documents also appear in the CODE OF FEDERAL REGULATIONS (Cumulative Supplement, 1944) title 31, subtitle B, Chapter I, parts 130-133, 137.

[24] Act of Oct. 6, 1917, 40 STAT. 415 (1917) as amended, 50 U. S. C. APP. (Supp. 1941-1943) §5.

[25] Joint Resolution of May 7, 1940, 54 STAT. 179. The ratification is judicially considered in United States v. Von Clemm, 136 F. (2d) 968 (C. C. A. 2d 1943), *cert. den.* 320 U. S. 769 (1943) and is discussed in McNulty, *Constitutionality of Alien Property Controls*, this symposium, *infra*, p. 135 at 136.

[26] Congress also recognized the possibility that although the Order applied only to Norway and Denmark, it could be extended. See 86 CONG. REC. 5006 (1940).

[27] Senator Connally in 86 CONG. REC. 5178 (1940).

The Course of Italy and Japan.—And at the same time international pressures were being exerted in other parts of the world. The course of both Italy and Japan had caused disquietude throughout the world for some years. Italy, the opportunistic junior European Axis partner, had thrown in its lot in active war with Germany shortly before the collapse of France. Italy had been one of the allies in the last war. It had remained on friendly terms with its former allies and its industries had benefitted by some financing. But it had turned Fascist and daydreamed of the glory that was Rome. Fascism could show in partial fulfillment of its promise the conquest of Ethiopia. Progressively alienated from the democracies and hopeful of easy booty it had joined with Germany.

Japan, chief ally of the Axis, had benefitted from the democracies but now became an actively collaborating Axis member. Japan also had been an ally of the victors in the last war and had gained considerably from its alliance. Its army and navy had been called upon but little. Its industries had profitably expanded. It had been the recipient of friendly foreign financing. It did not, as Germany, profit for the furtherance of its plans by the process of borrowing and default; its imperial and industrial bonds were serviced until World War II. Japan profited particularly by the complaisance of the democracies in its conquest in 1931 of Manchuria into which it had previously made economic penetration. Prior to World War II the financial and industrial organization of Manchuria had been leisurely completed. Since 1937 Japan had been attempting the conquest and absorption of China and at the same time, internally and by foreign trade, particularly with the democracies, was supplying itself for even greater conquest. To assist its own expansion by force, Japan eagerly endorsed the German plans of conquest.

The three Axis partners had certain similarities. All had actively adopted conquest as a national policy. All had profited by friendly relations with the democracies. Each had been able to secure the conquest and industrial and financial absorption of an important area without general war and was engaged in the conquest and absorption of others.

Now the world knows that those who hoped and believed that international finance would lead through world economic organization to universal peace were [illegible] their first premise . . . it does make the world interdependent. They were [illegible]n believing that this mutual dependence alone would prevent wars, and they failed [illegible]o see the possibility that one nation or group of nations would dare seek the control of this world organization for their own advantage. Bound together indeed the nations are, and when not united in the mutuality of universal peace, inevitably they are locked in the mutuality of universal war.

With conquest growing both in Europe and in Asia, the free use of credits within the United States would, in fact, have made the United States a substantial contributor to the cause of the invaders by acting as the financial medium for the supply of goods and services even though the Neutrality Act of 1939 forbade direct

trade with an aggressor.[28] Credits of the aggressors too could have been used for sabotage and espionage to the detriment of the United States and its world position. The unsupervised use by neutrals of their property might be contrary to necessary policies of the United States. And lastly the unanswered question became more insistent—had Germany and Japan, which had so carefully planned their economic and financial warfare elsewhere, overlooked the United States? Outposts were here in abundance, as for example, the branches and affiliates of I. G. Farben (Germany)[29] and Mitsubishi (Japan). Had a role been given to these outposts in the plan of world domination?

Economic Defense—The Amendment of the Executive Order, June 14, 1941.

In the face of growing world danger the United States took the next step for its protection on June 14, 1941. On this date an amendment[30] to the Freezing Order was published which added to the list of nations already frozen all the rest of continental Europe: the aggressor, the conquered, and the neutral nations.[31] The preamble to this Order carried the additional phrase not used in the previous Orders: "necessary in the interest of national defense and security." A few weeks later, July 26, 1941, when Japan overran Indo-China, Japan and China were added to this list. China was included at the request of its own government for its assistance and to prevent Japan from using the occupied areas in China as a base for evading the freezing control.[32]

The Order of June 14, 1941, remained the basic freezing order thereafter although countries as they were overrun were blocked.[33]

WAR—THE FIRST WAR POWERS ACT, 1941

Japan attacked Pearl Harbor on December 7, 1941 and declarations of war with

[28] 54 STAT. 4, 22 U. S. C. (1940 ed.) §§441-457.

[29] Levi, *op. cit. supra* note 19.

[30] EXEC. ORDER No. 8785, 6 FED. REG. 2897 (1941).

[31] Albania, Andorra, Austria, Czechoslovakia, Danzig, Finland, Germany, Italy, Liechtenstein, Poland, Portugal, San Marino, Spain, Sweden, Switzerland, and the Union of Soviet Socialist Republics were frozen by the Order of June 14, 1941. Only Turkey was excepted. Shortly after the amendment, the Soviet Union was attacked by Germany and was thereupon granted a general license which had the effect of completely remitting the control as to it. General License No. 51, 6 FED. REG. 3100 (1941).

[32] Press Release, July 26, 1941, DOCUMENTS (1944) *supra* note 23, at 106.

[33] By EXEC. ORDER No. 8963, issued December 9, 1941, 6 FED. REG. 6348 (1941), Thailand was added; EXEC. ORDER No. 8998, dated December 26, 1941, 6 FED. REG. 6785 (1941), added Hongkong. The latter order also contained a clause providing for the automatic inclusion of any area occupied or controlled by the armed forces of any blocked country. However, upon the occupation of the Philippines and British Malaya, the Treasury Department announced that these countries were deemed foreign countries separately designated in the Order. See Public Circulars No. 11 and 16, issued January 5 and February 18, 1942, 7 FED. REG. 147, 1126 (1942).

Although China, Japan, Thailand, Hongkong, and British Malaya were all frozen after June 14, 1941, the freezing in each case was as of that date. Practical problems of this retroactive freezing were obviated, however, by general licenses or equivalent provisions which in effect brought the freezing date in each case up to the date on which the Order was actually amended. See General Licenses No. 54, 76 and 78, 6 FED. REG. 3722, 6350, 6792 (1941), and Public Circular No. 16, *supra*. The freezing date as to the Philippine Islands was January 5, 1942, practically contemporaneous with the issuance of the freezing document, Public Circular No. 11, *supra*.

the Axis countries followed at once. On December 18, 1941, the First War Powers Act was passed. Title III of this Act amended Section 5(b) of the Trading with the enemy Act and conferred comprehensive authority to deal effectively with all ramifications of foreign property and foreign property ownership in the war emergency.[34] From discussions in Congress at the time, one may safely assume that Title III had been prepared by the executive branch of the government, particularly the Treasury and the Department of Justice. Its scope and the speed with which it was enacted could lead only to the inference that considerable attention had been given to the areas in which the powers previously granted by the Trading with the enemy Act were, or might be, inadequate for the grimmer phases of economic warfare. Thus Title III appears in the nature of a list or catalogue of powers and authorities for waging war on the financial front, and is a close-packed, broad delegation of powers. It was amended only once in Congress and the debate on the floor indicated no desire or effort to limit the powers but merely so to frame the Act, should any vesting of property occur, that careful reports would have to be made concerning such property. Unpleasant circumstances surrounding vested German property of the last war were to be avoided.[35]

In passing the First War Powers Act, Congress ratified everything which the President or the Secretary of the Treasury had done in respect to foreign property under the Trading with the enemy Act, as amended.[36]

From the time of the enactment of the First War Powers Act to February 12, 1942, no formal delegation of the additional powers granted by Title III was conferred upon any agency. On February 12, 1942, the President formally delegated all of his authority under Sections 3(a) and 5(b) of the Trading with the enemy Act to the Secretary of the Treasury,[37] who thereupon became the sole repository of the President's authority until the Office of the Alien Property Custodian was established on March 11, 1942.[38] Subsequently, on July 6, 1942, Executive Order

[34] 55 STAT. 839 (1941), 50 U. S. C. APP. (Supp. 1941-1943) §§5 and 616. The committee reports on the bill stressed the need of affirmative and flexible powers, H. R. REP. No. 1507, 77th Cong., 1st Sess. (1941) 3; SEN. REP. No. 911, 77th Cong., 1st Sess. (1941) 2.

[35] 87 CONG. REC. 9867 (1941). It will be noted that the language of the Act relating to reports is mandatory.

[36] The ratification clause of the First War Powers Act reads as follows: "All acts, actions, regulations, rules, orders and proclamations heretofore done, promulgated, made or ordered by, or pursuant to the direction of, the President or the Secretary of the Treasury under the Trading with the enemy Act of October 6, 1917 (40 STAT. 411) as amended, which would have been authorized if the provisions of this Act and the amendments made by it had been in effect, are hereby approved, and ratified and confirmed." 55 STAT. 840 (1941), 50 U. S. C. APP. (Supp. 1941-1943) §617. As to effect, see McNulty, *op. cit. supra* note 25.

[37] Memorandum to the Secretary of the Treasury from the President, 7 FED. REG. 1409 (1942).

[38] EXEC. ORDER No. 9095, 7 FED. REG. 1971 (1942). The Order (Section 2) granted the Custodian all powers under Sections 3(a) and 5(b) except such as had been delegated to the Secretary of the Treasury "by Executive Orders issued prior to February 12, 1942." Certain purely domestic powers were reserved to the Federal Reserve Board. The Alien Property Custodian thereupon temporarily redelegated all his authority to the Secretary of the Treasury [Memorandum for the Secretary of the Treasury, March 11, 1942, 7 FED. REG. 2115 (1942)]. The redelegation was never expressly revoked but the situation was covered by the issuance of EXEC. ORDER No. 9193.

No. 9193[89] was issued under which certain functions were allocated to the Custodian, and the Section 3(a) powers and the residual authority under Section 5(b) were again conferred upon the Secretary of the Treasury.

THE THREE PHASES OF FOREIGN FUNDS CONTROL

The operations of Foreign Funds Control can roughly be divided into three phases: (1) the period of the protection of assets of conquered countries, from the inception of the Control to June 14, 1941; (2) the period of defense from June 14, 1941 to the declaration of war; and (3) the period of economic warfare thereafter. In some respects, however, this simplification of the Control obscures its development. It may in fact be said more accurately that the policies and efforts of the Control followed progressively the increasing danger to the United States—from the time of the mere declarations that interests in the property of Denmark and Norway could not be changed by reason of conquest, to the last period when efforts were made to hurt the Axis wherever possible by preventing the acquisition of raw material, use of credits, and any advantages from foreign investments. In each period, problems coming before the Control had provided experience and information by which the next step could be taken more effectively.

OBJECTIVES AND POLICIES

The original and continuing policies in regard to blocked funds within the United States do not seem well understood, and the Treasury appears at times to have been somewhat loathe to explain its purposes in this regard in detail. From the very inception of Foreign Funds Control, during the period of neutrality and throughout the war, the policy in regard to the blocked assets in the United States of invaded countries has remained virtually unchanged. A grasp of the fundamental policies is necessary for an understanding of all the work of the Control. The first property blocked was that of friendly invaded countries. To this property was added that of the aggressor nations, now enemies, and the property of the blocked neutral nations. An examination of the work of the Control for over four years and consideration of the transactions which it licensed or did not license show consistent policies in respect to blocked assets. Minor shifts and changes in execution may be seen; the basic objectives and the policies for achieving these objectives remained the same.

As to Property of Occupied Countries.

The first effort of the Control was the immobilization of the assets within the United States of the invaded countries, in order to prevent any beneficial interest in these assets from falling into the hands of the invaders, and also to protect American institutions from possible adverse claims which might arise in a dispute by the original owner of right and title and by someone who claimed to have secured that

[89] 7 FED. REG. 5205 (1942).

right or title. From its inception Foreign Funds Control never deviated from the principle that no matter what nationals of such a blocked country might do, in execution of documents or otherwise, no change of title or other beneficial interest —including imposition of any lien, pledge, or other right in property—could be accomplished without a Treasury License.[40] In general no transfer, release, or other disposition which would have the effect of reducing the assets has been permitted. It should be emphasized that it was change of title or beneficial interest, not mere payment, that the Treasury tried to prevent. If title could be transferred, the Control would be illusory for then Germany could through the black markets of the world dispose of title documents to persons who might be willing to furnish goods, services, or credit to the Axis, in exchange for a valid "title" to blocked assets even though knowing that these could not be utilized until a later date.

To the general policy of immobilization there were exceptions. The first was a temporary one permitting the completion of bona fide transactions which had been commenced before the time when the assets affected were blocked.[41] This, however, was obviously designed as a mere expedient to prevent undue harshness by the sudden imposition of the Order prohibiting transactions without a license. Other exceptions, which have continued, would apparently include payments from blocked funds which are required for the preservation of assets. Also when, prior to the date assets involved were blocked, liens thereon had been clearly established, either by the untrammeled consent of the parties or by due judicial process, the right in blocked funds was recognized. Use of blocked funds has been permitted for the necessary support of persons in the United States who owned or had some right in them,[42] to which may be added a similar though more indefinite category where denial of a license would cause undue hardship on the person who had by substantial evidence shown his right to the assets. The Treasury also pursued a wholly consistent but positive policy that all transactions helpful to the war effort were not only licensed but were encouraged and even directed.[43]

Consistent with these basic ideas of protection by immobilization, the Control repudiated the notion that a transaction affecting blocked funds should be licensed merely because it appeared to be harmless in itself and an American person or corporation of unimpeachable loyalty was the recipient of the blocked funds. Licensing by the Treasury must in many instances be an *ex parte* matter. All of the parties to the transaction could not be interviewed and, in any case where a doubt existed that the documents presented had been voluntarily executed by the blocked national whose account was to be charged, the Treasury would deny the requested

[40] See further discussion, in this article, under "litigated matters," *infra* p. 44.

[41] For example, see General License No. 45, 6 FED. REG. 2907, 3521, 3888 (1941) relating to checks and drafts, and General License No. 48, 6 FED. REG. 2908 (1941) relating to securities, both issued after the amendment of June 14, 1941, to EXEC. ORDER No. 8389.

[42] General License No. 11, 5 FED. REG. 1804 (1940), 9 FED. REG. 12954 (1944), covers many such cases. Persons with unusual needs may obtain special licenses.

[43] The power *to direct* was granted in the First War Powers Act, 1941.

transfer even if it came in the limited categories which might otherwise be licensed.

The question of the reliability and conclusiveness of evidence in support of an application for a license has always been a serious one. Disruption of communication facilities before the war and cessation of all forms thereafter made independent investigation of documents presented to the Control virtually impossible. Press releases put out from time to time by the Treasury[44] indicate the conviction that "title" was secured by the enemy in many and different ways; that documents were created or acquired to give apparent validity to transactions and were varied in character to fit the peculiar circumstances of each case. Though valid in form there was no assurance that the rights of the beneficial owner were not in fact disregarded. These documents included transfer and payment orders, checks, drafts, acknowledgments of indebtedness, assignments, and powers of attorney. They might come from proper custody; they might arrive mysteriously from unknown sources.

The Treasury recognized that this policy of keeping all blocked property immobilized until the Control could be completely assured of the propriety of the transfer frequently prevented bona fide transactions. Although this policy may have created hardship in certain instances, the Treasury appeared to believe that evils which could be prevented by such general immobilization must be considered as outweighing the hardships by limitations on bona fide transactions. It apparently recognized that payment of a claim could not in all probability readily be rectified after the war and it conceived its duty as twofold: to preserve the assets in this country for the true owner and to prevent the enemy from acquiring any benefit from the transfer of title to such assets.

The claims of creditors against nationals of the enemy-occupied countries presented a serious problem. Discussion of the position of the American creditors appears in the debates in Congress at the time of the May 7, 1940, amendment.[45] The Control appears to have denied many of this class of claims against blocked assets of the overrun countries, appearing to believe that such claims should await a time when all parties to the transaction could be heard. Then, too, the release of property of a blocked national, in the complete absence of knowledge of his financial position or what that ultimately might be, in order to pay the claim of one of his creditors, however legitimate and well documented that claim might be, could be prejudicial to other Americans having equally meritorious claims. Not all of the claims sought to be paid out of such blocked property were by Americans; foreigners either themselves or through resident assignees sought payment out of property blocked in the United States, often for transactions which were to have been performed abroad and were to have been paid in foreign currencies. Obviously not all foreign claimants had the opportunity of pressing their claims in America and pay-

[44] For example, see Press Release No. 31-28, April 21, 1942, DOCUMENTS (1944) *supra* note 23, at 122.

[45] See *supra* note 22. See also *Hearings on H. R. 4840 before Subcommittee No. 1 of the Committee on the Judiciary*, 78th Cong., 2d Sess. (1944), 97. (Testimony of Ansel F. Luxford, Assistant General Counsel, Treas. Dep't.)

ment of these claims might have favored the lucky rather than the diligent creditor. The payment of any such claims might give preferential advantage over all other creditors domestic or foreign.

Certain of the foreign countries have resorted to "protective vesting" of the assets of their nationals partially, at least it would appear, to defeat foreign claimants seeking to attach property in the United States.[46] In one case the court held that after the vesting order of the friendly foreign government, the property of its nationals could not be attached in a suit by an assignee of a foreign claimant.[47]

As to Property of Aggressor, Now Enemy, Countries.

Here too the Treasury adopted a policy of immobilization but for different reasons. Clearly at first it was to prevent Germany and her partners from securing any advantage from these assets in the course of aggression and to prevent their use in ways inimical to the United States. After the commencement of the war, this immobilized property was enemy property. A large amount of it has now been vested by the Alien Property Custodian.[48] Property not vested in the Alien Property Custodian remains blocked under Treasury regulation.

Much discussion has taken place concerning the disposition of enemy property after the war. Officials of the Treasury have indicated in informal speeches and in testimony that considerable study within the Treasury has been given to this problem. They have always been careful, however, to say that no one policy has been adopted by the Government or urged by the Treasury.[49] Except for certain bills introduced into Congress[50] there is no indication of a plan or policy for the treatment of these enemy assets nor, it may be said, of the treatment of claimants—either commercial creditors or those suffering war damages. It may be observed in considering various possibilities that potential American private claims not including war damage claims exceed the estimated value of Axis assets in this country.[51]

[46] Netherlands: Decree of May 24, 1940, STAATSBLAD No. A1, as amended by Decree of May 7, 1942; STAATSBLAD No. C34, issued in London, May 7, 1942, C. C. H. 1942, War Law Serv. (Foreign Supp.) ¶67,150. Norway: Provisional Order in Council of April 22, 1940, C. C. H., *supra* at ¶67,704. Belgium: Decree Law of March 19, 1942. See paragraph (6) of General Ruling No. 12, 7 FED. REG. 2991 (1942).

[47] Anderson v. N. V. Transandine Handelmaatschappij, 289 N. Y. 9, 43 N. E. (2d) 502 (1942), relating to the Netherlands decrees. The extraterritorial effect of the Norwegian decrees was upheld in England in Lorentzen v. Lydden [1942] 2 K. B. 202; defendant's appeal dismissed by consent, *id.* at 216. See Lourie and Meyer, *Governments-in-Exile and the Effect of Their Expropriatory Decrees* (1943) 11 U. OF CHIC. L. REV. 26 (1943); MCNAIR, LEGAL EFFECTS OF WAR (2 ed. 1944) 358. See also hereinafter, with regard to suits against blocked funds, p. 000.

[48] A yearly statement as to the property vested by the Custodian is contained in the Annual Reports of the Office of the Alien Property Custodian.

[49] *Hearings, supra* note 45, at 101; Orvis A. Schmidt, Acting Director, Foreign Funds Control, speech before the Thirty-First National Foreign Trade Convention, New York City, October 9, 1944.

[50] H. R. 3672, 78th Cong., 1st Sess. (1943)—bill providing for confiscation of German assets; S. 2038 and H. R. 5118, 78th Cong., 2d Sess. (1944)—bill providing a program for compensation of United States nationals for losses incurred since 1931; H. R. 5177, 78th Cong., 2d Sess. (1944)—bill to provide for the reimbursing of certain civilian personnel for personal property lost as a result of the Japanese occupation of Hongkong and Manila.

[51] See *Hearings, supra* note 45, at 104; Press Release No. 41-61, April 20, 1944.

Foreigners too have made claim to German property and in normal times many such claims could have been litigated in the United States. The Supreme Court has observed that there is no constitutional reason why the United States should be a collection agency merely because some foreign property was held within its jurisdiction against which non-resident aliens have made a claim, and that it is right and proper to pursue a policy in respect to these assets of more direct advantage to the United States and United States claimants.[52]

If at the end of the war all enemy property originally blocked is still available —except for transfers which have met the rigid test applied to all transfers of any blocked property—then the ultimate determination concerning their disposition can be effectual. The passage of a law may create liability but cannot re-create assets. In accordance with American tradition all ideas and proposals for the final disposition of enemy assets will be argued in the public press and on the floor of Congress and in any other way in which the government may legitimately be urged to adopt a particular policy. It is of concern to the Treasury that in so far as its obligation is involved the property will be available for this ultimate decision.[53]

As to Property of Blocked Neutral Countries.

The considerations of immobilization for preservation of property obviously do not apply to the property of the blocked neutrals. Here the problem is to prevent transactions which might be of advantage to the aggressor nations and in this respect the work of the Control is more in the nature of control of transactions than a blocking of property. At least one problem, however, arises in connection with neutral property not present in respect to enemy property and of much less significance in connection with the property of enemy occupied countries since they are treated under the policy of immobilization. That is, the common practice of European financial institutions to hold within the United States in their own names, funds and securities deposited with them by their clients—persons whose identity, nationality, whereabouts, and very existence cannot be determined until the end

[52] United States v. Pink, 315 U. S. 203, 228 (1942). The court said: "To be sure, aliens as well as citizens are entitled to the protection of the Fifth Amendment, Russian Volunteer Fleet v. U. S., 282 U. S. 489. A State is not precluded, however, by the Fourteenth Amendment from according priority to local creditors as against creditors who are nationals of foreign countries and whose claims arose abroad. Disconto Gesellschaft v. Umbriet, 208 U. S. 570. By the same token, the Federal Government is not barred by the Fifth Amendment from securing for itself and our nationals priority against such creditors. And it matters not that the procedure adopted by the Federal Government is globular and involved a re-grouping of assets. There is no Constitutional reason why this Government need act as the collection agent for nationals of other countries when it takes steps to protect itself or its own nationals on external debts. There is no reason why it may not, through such devices as the Litvinov Assignment, make itself and its nationals whole from assets here before it permits such assets to go abroad in satisfaction of claims of aliens made elsewhere and not incurred in connection with business conducted in this country. The fact that New York has marshalled the claims of the foreign creditors here involved and authorized their payment does not give them immunity from that general rule."

[53] Schmidt, Speech, *supra* note 49: "It is clear that the controls of assets of the enemy countries must remain in effect until decision has been made as to the disposition of such assets."

of the war.[54] The beneficial ownership in such accounts may be neutral, enemy, or national of friendly occupied countries. Unless the evidence of beneficial ownership is clear beyond a doubt, trading in such accounts might be in derogation of all of the basic policies of the Control. Accordingly, the Treasury prohibited all transactions, including the receipt of dividends or interest, with respect to securities held in any account in the name of a financial institution located in a blocked country unless the custodian in the United States was furnished with adequate information as to the ownership of the securities, or they were placed in an account from which they could be withdrawn only under special license.[55]

General Policies of Economic Warfare

The economic warfare aspects of the Control were definitely announced at the Inter-American Conference on Systems of Economic and Financial Control, June 30, 1942. They are:

"(a) The complete severance of all financial and commercial intercourse, trade and communication, direct or indirect, between the United States and the Axis and Axis-dominated countries.

"(b) The prevention of all financial and commercial intercourse and trade between the United States and any country outside the Western Hemisphere which directly or indirectly benefits the Axis.

"(c) The prevention of all financial, commercial and trade transactions between the United States and any other American Republic which directly or indirectly benefit the Axis, including all transactions which benefit real or juridical persons within the American Republics whose influence or activity is deemed inimical to the security of the Western Hemisphere.

"(d) The elimination of all financial and commercial activities engaged in by real or juridical persons within the United States whose influence or activity is deemed inimical to the security of the Western Hemisphere."[56]

These objectives require no explanation and the licensing policies to carry them out are obvious.

[54] The question of who was the actual or beneficial owner of specific securities held by American banks in accounts for foreign banks had arisen in the United States almost immediately after the Munich agreement. Numerous suits for example had been commenced in New York by persons formerly residents of Czechoslovakia to obtain securities claimed by them to have been purchased through foreign banks and held by these banks for their account in New York. The New York banks knew and recognized only the foreign banks as their customers. Also there were suits to collect debts by persons whose claim was disputed by some national of Czechoslovakia. To protect financial and business institutions from double liability the New York legislature passed in the spring of 1939 two bills prepared by the Committee on Law Reform of the Bar Association of the City of New York. New York, L 1939, chs. 804, 805, CIVIL PRACTICE ACT §§51a, 287a to 287e, inc. Numerous cases, many of which are still pending, have been brought under these sections.

[55] General Ruling No. 17, 8 FED. REG. 14,341 (1943). See also Public Circular No. 21, 8 FED. REG. 845 (1943). When the ruling was issued, its effect was confined to the European neutral countries by exemptions granted on the accounts of institutions in other blocked countries, but with the liberation of those areas the Control is faced with the question whether their omnibus accounts should not likewise be broken down.

[56] U. S. TREAS. DEP'T, ADMINISTRATION OF THE WARTIME FINANCIAL AND PROPERTY CONTROLS OF THE UNITED STATES GOVERNMENT (1942). This document prepared for the Conference was for the confidential use of the delegates but was later made a public document by the Secretary of the Treasury.

So diverse have been the problems of Foreign Funds Control that it is difficult to summarize the objectives and policies as a whole. The basic policy is, of course, immobilization for protection, defense or economic warfare, but at the same time to encourage the use of property in any way advantageous to the war effort of the United Nations. This use is not necessarily inconsistent with immobilization for it is preservation of rights in property, not mere preservation of the form of the property, that is desired.

INTERPRETATION AND APPLICATION

It may be said that at the outset the Treasury Department was equipped with somewhat clumsy legal tools to carry on its work. These were improved as its operations progressed and conditions made the importance of its work evident. The Department at the inception of the freezing control, and at various later times, was faced with technicalities in applying the powers granted to the Secretary by the President under Section 5(b) of the Trading with the enemy Act. What these problems were and how they were resolved is useful in explaining the techniques adopted by the Treasury. Only the barest outline can be given but even this may lead to a better understanding of the form and language of the various documents which make up the freezing regulations.

Trading with the enemy Act.

The authority wielded by the Treasury stemmed from powers granted by Congress to the President under Section 5(b) of the Trading with the enemy Act. As first passed in 1917, Section 5 was but a part of a lengthy act designed to institute necessary controls in a then existing war and to further the prosecution of that war in other ways. The Act established an Alien Property Custodian who vested enemy property. It appears that Section 5(b) as originally passed was not primarily conceived as a property control nor even to immobilize property. That function was delegated to the Custodian. Section 5(b) was to prevent, except under supervision, certain transactions which were not otherwise controlled. Those financial transactions which directly or indirectly might be of advantage to the enemy and would normally be accomplished through usual banking channels were to be prevented.

The form of Section 5(b), and it may be said to some extent also its application, had been changed before it was invoked in 1940 for the purpose of freezing foreign assets. Between World War I and the inception of freezing control this section had been thrice amended.[57] It had twice been invoked for domestic emergencies—in the Banking Holiday[58] and in support of the Government's gold policy.[59] Now it was used to protect property within the United States of Norway and Denmark

[57] 40 STAT. 535 (1918); 40 STAT. 966 (1918); 48 STAT. 1 (1933).

[58] Proclamation No. 2039, March 6, 1933, 31 CODE FED. REGS. (1939) §120.1.

[59] EXEC. ORDERS No. 6102, April 5, 1933; No. 6111, April 20, 1933; No. 6260, August 28, 1933, 31 CODE FED. REGS. (1939) §§50.1 to 50.11, inc.

and their nationals—to assure that title or other interest in that property could not be acquired by Germany through the conquest of those countries.

Almost immediately after it was invoked in 1940 Section 5(b) was again amended. Yet in these various changes the basic framework of the section as emergency legislation under which financial transactions could be controlled remained very much the same. In 1917 the purpose was to prevent one country and its allies from obtaining advantage from transactions which it would wish to carry on. The country was Germany, then an enemy. On April 10, 1940 the United States was at peace; it had no recognized enemies. Again, however, the Act was directed against Germany, not then an enemy but an aggressor; the aim was to prevent transactions which Germany might desire to effect relative to the property of Norway and Denmark and their nationals.

Since the discretionary prohibitions contemplated in Section 5(b) were selective, the first problem to be met by the Treasury was one of definition. The intention was to protect the *property* of Norway and Denmark and their nationals from confiscation by conquest. Yet because of the form of Section 5(b), it was necessary to invoke prohibitions against defined *transactions*.

The Executive Order.

Executive Order No. 8389, as amended,[60] transferring authority under Section 5(b) of the Trading with the enemy Act to the Secretary of the Treasury naturally followed and incorporated the language of that section. The definition of the area in which power was to be exercised was accomplished by (1) limiting the Control to transactions ". . . if (i) such transactions are by, or on behalf of, or pursuant to the direction of any foreign country designated in this Order, or any national thereof, or (ii) such transactions involve property in which any foreign country designated in this Order or any national thereof, has at any time on or since the effective date of this Order had any interest of any nature whatsoever, direct or indirect . . ." (Section 1) and (2) by specifying what classes or groups of persons were to be considered "nationals" of a country. A "national" of a foreign country was defined under four categories as follows:

"(i) Any person who has been domiciled in, or a subject, citizen or resident of a foreign country at any time on or since the effective date of this Order.

"(ii) Any partnership, association, corporation or other organization, organized under the laws of, or which on or since the effective date of this Order had or has had its principal place of business in such foreign country, or which on or since such effective date was or has been controlled by, or a substantial part of the stock, shares, bonds, debentures, notes, drafts, or other securities or obligations of which, was or has been owned or controlled by, directly, or indirectly, such foreign country and/or one or more nationals thereof as herein defined.

[60] As has already been indicated, the Executive Order was amended on numerous occasions, mainly to increase the list of countries "affected by the Order." In the present paragraph, and generally throughout the remainder of this article, the Executive Order referred to is the Order as it was amended on and after June 14, 1941. See note 33 *supra*.

"(iii) Any person to the extent that such person is, or has been, since such effective date, acting or purporting to act directly or indirectly for the benefit or on behalf of any national or such foreign country, and

"(iv) Any other person who there is reasonable cause to believe is a 'national' as herein defined." (Section 5E.)

The Executive Order had the further definitive explanation that "transactions [which] involve property in which any foreign country designated in this Order, or any national thereof, has . . . any interest of any nature whatsoever direct or indirect, shall include, but not by way of limitation (i) any payment or transfer to any such foreign country or national thereof, (ii) any export or withdrawal from the United States to such foreign country, and (iii) any transfer of credit or payment of obligation, expressed in terms of the currency of such foreign country." (Section 5A.) The Executive Order also prohibited "any transaction for the purpose or which has the effect of evading or avoiding the foregoing prohibitions." (Section 1F.)

In Section 2 of the Order all dealings in securities were prohibited when there was any evidence to show that the securities were or had been outside of the United States. Securities within the United States belonging to a blocked national could be dealt with only under license (Section 1E).

It must also be understood that the word "banking institution" had by definition lost its narrow and technical meaning as originally used in the Trading with the enemy Act and now included practically any person or institution by or through whom a financial transaction could be effected, including any person who held credits for others.[61]

And thus by the method of prohibiting transactions which affected the property of blocked nationals, no act whatever could be lawfully done without a license, by which any person could acquire, or any blocked national alienate, the title to or any beneficial interest in blocked property. Nor could any transaction be lawfully effected to accomplish such acquisition or alienation which was in evasion or avoidance of the Order, even if not expressly prohibited.

Treasury Regulations.

The Treasury issued "Regulations under Executive Order No. 8389, as amended." In these regulations there were three significant items. One was the definition of the words, "property," "property interest," and "property interests" which indicated the extreme breadth of the Control over the property of blocked nationals.[62] The second was the provision that the "custody" of a safe deposit box included not only the persons having access thereto, but the lessors whether or not the latter had

[61] EXEC. ORDER No. 8389, §5F; General Ruling No. 4, item (9), 5 FED. REG. 2133 (1940), 6 *id.* 2583, 3350 (1941), 8 *id.* 12,285 (1943).

[62] Regulations of April 10, 1940, as amended, 6 FED. REG. 2905, 3722 (1941), DOCUMENTS, *supra* note 23, at 16. Other important definitions relating to the Control are set forth by General Ruling No. 4, *supra* note 61.

access to the box.[63] The third was the requirement for a comprehensive report of the amount and kind of foreign-owned property in the United States by the persons or institutions having the custody, control, or possession thereof.

To some the control appeared complicated and instances of misunderstanding arose. It was not immediately realized by many that the system represented immobilization of property except under license. An inflexible immobilization had been used in the last war through the medium of vesting; many therefore believed that business could be carried on as usual except for such particular transactions as might be determined to be inimical to the general position of the United States, and that denial of a license would be the exception rather than the rule. Others believed that since the Act was written in terms of the prevention of listed and defined transactions that some dealings in or acts affecting the blocked property could be carried out without a license.[64] Another misconception was that merely payments by banks were prevented and that unlicensed transfers were not necessarily void. One court had occasion to correct this misconception.[65]

These confusions and misunderstandings caused demands to be made not only for explicit statements, as to the limits under which the Control *could* be exercised, but for definition of the boundaries within which the Treasury *would* exercise its control. In particular the question was continually asked what types of transaction would be licensed. The Treasury evidently realized that its first duty was immobilization of the property (for more than a year it was concerned only with the property of the invaded countries); yet it must maintain a system sufficiently flexible that property could be used should the transaction be deemed desirable. Complete immobilization was undesirable for various reasons and might even defeat the purpose of the Order which initially was to protect the true owners and not necessarily to deprive them of all use of their property.

As the list of countries protected by the Order grew with the rapid triumphal march of Germany through the countries of Europe, it seemed to many that the

[63] Doubt has existed whether the lessor or the lessee of the safe deposit box has custody. This provision of the regulations was to clarify the obligations of the parties in respect to property in safe deposit boxes. In Carples v. Cumberland Coal and Iron Co., 240 N. Y. 187, 148 N. E. 185, 186 (1925), concerning the relation of the lessor of a safe deposit box to a lessee, the Court made the following observation: "But however we may estimate the relative rights and possession of a safe deposit company and customer as between themselves, it was perfectly proper for the Court, so far as this aspect is concerned, to make the Order (for a sheriff to open the box) in question. If the property in the box is to be regarded as in possession of the customer, the Order was perfectly right and if, on the other hand, we regard the safe deposit company as in some respects a bailee and having possession of the box, it was still proper for the Court to make the Order which it did, and which with the levy of the sheriff thereunder will be ample protection to the company as against the defendant (the lessee)."

[64] Note, *The Effect of the Freezing Order in Civil Actions* (1942) 42 COL. L. REV. 1190.

[65] Commission for Polish Relief, Ltd. v. Banca Nationala a Rumaniei (National Bank of Rumania), 288 N. Y. 332, 43 N. E. (2d) 345 (1942), in which the Court said: "As read by the Special Term the Executive Order leaves open the way to an 'assignment of the defendant's claims against the banks that would carry the title.' . . . The Appellate Division likewise conceived of the Order as a command which 'operates exclusively *in personam* upon the banks.' We hold a different opinion in respect of this question."

intention of the Treasury to maintain a flexible policy could not be fulfilled. However, the Government was not forced to an inflexible policy for, by the system of general licenses, it relieved itself of close supervision of those areas in which little or no supervision was necessary.[66]

The Treasury continued its policy of examining transactions as they arose. It was explicit in rules and regulations on particular problems but it did not bind itself to a fixed course of action. The Department appeared to believe for good reason that it must apply the Executive Order as a prohibition of any financial transaction affecting the property of blocked nationals which in its judgment was contrary to the public interest in the emergency. By the Executive Order the discretion of the Secretary of the Treasury in approving or denying a license was final.[67]

The Trading with the enemy Act, as amended, on which the authority of the Treasury was based, was a delegation of powers to be exercised in emergency—war or peace, international or domestic. As applied to this emergency, it stood alone; it was not part of any other system. The property of blocked nationals must be dealt with in accordance with the general policies of the United States under this law or not at all: there was no other grant of power. The First War Powers Act of 1941 was not passed till war had actually been declared; no property had yet been intrusted to an Alien Property Custodian.[68] Emergency power not ample to meet an emergency; executive power ineffectual to protect the country against unforeseen danger could have been but another example of the weaknesses which critics have charged were inherent in democratic government, high-minded in purpose, well-meaning but deficient in execution.[69]

The Treasury therefore applied the purpose and principle of this emergency law to the particular emergency in hand. Construing the purpose and principle of a law to a specific circumstance arising is not a new and unique method of legal application and determination.[70] Deciding only whether a particular set of facts presented is within or without a concept is a technique not unfamiliar in the deliberations of the Supreme Court.[71] This was the technique that the Treasury employed in carrying out its obligations. A flexible control, capable of change to meet a changing situation, for accomplishing obvious objectives, was the Treasury goal.

[66] See discussion *infra* pp. 38 ff.

[67] EXEC. ORDER No. 8389, §7.

[68] See footnotes 38 and 39 *supra* and text thereto.

[69] 1 BLACKSTONE, COMMENTARIES *49 ff.

[70] *Id.* at *61: "For, since in law all cases cannot be foreseen or expressed, it is necessary that, when the general decrees of the law come to be applied to particular cases, there should be somewhere a power vested of defining those circumstances, which (had they been foreseen) the legislator himself would have expressed. And these are the cases which, according to Grotius, lex non exacte definit, sed arbitrio boni viri permittit." (The law does not nicely prescribe, but gives latitude to the judgment of a virtuous [learned] man.)

[71] Twining v. New Jersey (1908) 211 U. S. 78, 100: "This court has always declined to give a comprehensive definition of it [due process of law], and has preferred that its full meaning should be gradually ascertained by the process of inclusion and exclusion in the course of the decision of cases as they arise."

Administration of the Control Through Federal Reserve Banks.

The Control had to be in a position to function promptly in all parts of this country, although its activity was largely in New York. It immediately established its work through the Federal Reserve Banks, each one of which acted as a field office in its own district. Applications were directed to the Federal Reserve Bank, in the district of the person or institution desiring to apply for the license.[72] Through the twelve Federal Reserve Banks, immediate contact was made by the Treasury with the approximate number of 15,000 banks in the United States, any one of which at any time might have a client who desired to effect a transaction prohibited except under license.[73] In this way, all blocked bank accounts within the United States were immediately affected, as well as most security accounts and a majority of safe deposit boxes. Also any customer of a bank whether or not a blocked national could have immediate information from his own bank regarding his duties and liabilities with respect to blocked property. New regulations or changes in previous ones could immediately be communicated throughout the country.

The Treasury has recognized that banks throughout the United States have had imposed upon them a heavy responsibility which in general they have cheerfully borne.[74] Throughout the country there has been an increasing degree of efficiency in carrying out the licensing program and in the reporting of property. It is natural that some mistakes have been made but the Treasury has generally taken a lenient view of unintentional technical violations. It has, however, necessarily demanded that a high degree of diligence and care be exercised in matters relating to blocked property.

With its authority established and a system selected for disseminating detailed regulations, the Control thereupon issued from time to time, as the situation required, not only specific licenses, but also general licenses, general rulings, public interpretations, and public circulars, and other miscellaneous documents, each referring to some particular phase or problem. In all, the Control has issued some 150 public documents, many of which were accompanied by an explanatory press release. The more bitter critics of the Foreign Funds Control insisted that even these press releases were used as regulatory documents, and remarks were heard about "government by press release." Sarcasm is seldom fair criticism. The press release was a necessary document since the Control was often dealing with complicated transactions not within the daily experience of the generality of citizens.

[72] Regulations of April 10, 1940, as amended, §130.3, 6 FED. REG. 2905, 3722 (1941), DOCUMENTS, *supra* note 23, at 16.

[73] The Reserve Banks also circularized most brokers and a selected list of business corporations and other persons specially interested in the Control.

[74] Addresses of Norman E. Towson, Assistant Director of Foreign Funds Control, U. S. Treasury Dep't, before the New York City Bank Comptrollers and Auditors Conferences, November 18, 1941, and before the New Jersey Bankers Association at Princeton, N. J., November 28, 1941; Randolph Paul, Acting Secretary of the Treasury, Letter dated December 17, 1943, addressed "To Banks and Other Financial Institutions in the United States," THE AMERICAN BANKER, December 22, 1943.

Obviously not all of the documents issued by the Treasury for the control of foreign funds can be considered separately and, fortunately, it is not necessary that they should be for an understanding of the Control. Knowledge of the operations of the Control can better be achieved by examination of the programs instituted. These for convenience can be divided into two great groups; one group being those programs particularly directed to the protection of property of blocked nationals within the United States, and the other group to the economic defense and warfare programs of the Control which to a large degree sought to affect operations outside of the United States. This division is merely for convenience in examining the work of the Control and is somewhat artificial, since the work at least after Pearl Harbor showed a unity in operation in which each part supported each other part.

PROGRAM OF THE CONTROL RELATING MORE PARTICULARLY TO BLOCKED PROPERTY WITHIN THE UNITED STATES

General Licenses.

The area which the Control undertook to regulate was broad; its basic policy immobilized except under license *all* property within the United States of *all* nationals of every country blocked under the Order. However, within this broad area were divisions in which but little and, in some cases, no supervision was necessary. By a system of general licenses permitting certain categories of transactions in blocked property the Control achieved flexibility without impairing its ultimate power. A license could be contracted or expanded by the addition or remission of conditions. Where it was deemed necessary, the Control could keep itself advised by means of required reports. Changes were frequently made in general licenses and upon occasion they were revoked.

The general licenses can be divided into three major groups: (1) as to persons; (2) as to geographic areas; and (3) as to particular types of transactions.

As to Persons. Most individual nationals of blocked countries who had been living within the United States for periods of time had the Control remitted under general licenses by which they were designated "generally licensed nationals."[75] They were regarded for practically all purposes as though not nationals of any foreign country.[76] However, where the transactions or affiliations of any one such person came under suspicion, the general license as to him was revoked; this mean-

[75] General License No. 42, 6 FED. REG. 2907 (1941), 7 *id.* 1492 (1942); General License No. 42A, 6 *id.* 6104 (1941), 7 *id.* 468, 1492 (1942); General License No. 68, 6 *id.* 3726 (1941), 7 *id.* 1492 (1942); and General License No. 68A, 6 *id.* 6454 (1941), 7 *id.* 305, 1854 (1942), 8 *id.* 4877 (1943); Press Releases No. 16, No. 19, and No. 29, DOCUMENTS, *supra* note 23, at 111, 112, 118. Originally, comparable freedom for nationals in the United States was achieved through the definition of "national" in the Executive Order. The technique was not inappropriate at a time when protection of property formed the chief aim of the Control, but it obviously would have been a serious hindrance in the period of economic defense which was signalized by the amendment of June 14, 1941, to the Order.

[76] General Ruling No. 4, 5 FED. REG. 2133 (1940), 6 *id.* 2583, 3350 (1941), 8 *id.* 12,285 (1943).

ing of course that he reverted to his position as "blocked national" and had to secure a special license for every transaction thereafter, except those permitted to all.

The problem of Americans returning to this country after residence abroad had made them by definition "nationals of foreign countries" was likewise met by a general license.[77]

A general license was granted to all persons living in the United States, of whatever nationality and regardless of how long they had been here, which enabled them to secure a certain amount from their own blocked funds within this country for living expenses.[78] If the amount permitted under the general license was, in a particular case, insufficient for special needs as for example, to continue the education of their children in American schools, special applications could be made to increase the amount.

The effect of this system of general licenses was, that under supervision, the conditions of living within the United States could continue in a practically normal manner for the vast majority of persons within the United States who were blocked by the Order. Not only was it of advantage to the blocked nationals themselves but also to Americans dealing with them. It was feared by many in the first imposition of the Control that every person in business would be forced to the impossible task of determining positively that everyone with whom he dealt was not a blocked national and that every transaction in which he engaged was free from blocked interest. After the system of general licenses had been in force for some time the Treasury publicly declared that "persons dealing with residents of the United States may now assume that such residents are not blocked unless they are affirmatively on notice to the contrary."[79]

As to Geographic Areas. A general license was given for trade with certain regions, collectively called "the generally licensed trade area."[80] With respect to this area, no further or special license was required for normal trade with nationals of blocked countries, unless their names appeared on the "Proclaimed List of Certain Blocked Nationals."[81] The regions within the trade area were either specific blocked areas, not controlled by the Axis or by Axis-dominated governments, or non-blocked areas whose governments were favorably disposed toward the United

[77] General License No. 28, 5 FED. REG. 2807 (1940), 6 *id.* 3349, 4663 (1941).

[78] General License No. 11, 5 FED. REG. 1804 (1940), 9 *id.* 12,954 (1944). Special rules were applied to internees and persons similarly under surveillance after the advent of war.

[79] Press Release No. 30-44, February 23, 1942, DOCUMENTS, *supra* note 23, at 118. It would seem that a question may remain as to civil liability. The Treasury has declared that every unlicensed transaction in blocked funds is void. General Ruling No. 12, 7 FED. REG. 2991 (1942). If an inadvertent transaction was conducted within the United States in reliance upon the statement quoted in the text, would such a transaction be considered valid? Some protection is offered to the holder of property who on order pays the property not knowing a license is required. General Ruling No. 12A, 8 *id.* 1833 (1943). This, however, by its terms does not protect the ultimate recipient.

[80] General License No. 53, 6 FED. REG. 3556, 3946, 5180 (1941), 8 *id.* 4876, 6595 (1943), 9 *id.* 2084 (1944). A standard of conduct for American concerns in Latin America in relation to the license was promulgated in Public Circular No. 8A, 8 *id.* 4877 (1943).

[81] This List is further discussed *infra* p. 56.

States. The license was particularly useful to traders in relation to the latter group of countries since it would have been difficult to ascertain whether or not foreign purchasers or sellers were blocked nationals. Moreover, application for and granting of specific licenses when required would inevitably have caused delay in shipment.

The granting and continuation of these trade licenses depended upon the political situation with respect to each nation involved and upon the degree of likelihood that such nations and their nationals were engaging or might engage in transactions for the benefit of the Axis, or inimical to the interests of the United States.

The "generally licensed trade area" of the world at present includes: (1) the American Republics; (2) the British Commonwealth of Nations; (3) the Union of Soviet Socialist Republics; (4) the Netherlands West Indies; (5) the Belgian Congo and Ruanda-Urundi; (6) Greenland; (7) Iceland; (8) Syria and Lebanon; (9) Caledonia, Tahiti and the French Establishments in India.[82] Trade with these areas remained subject to export licenses, the granting of which was not under the supervision of Foreign Funds Control. However, close cooperation is maintained between the Treasury and the agencies granting these licenses.[83]

The neutral European countries, Sweden, Switzerland, Spain and Portugal, were also granted general licenses for the transactions of their governments and their nationals.[84] Subject to the conditions of the licenses, a transaction could be consummated under official certification or through the central bank for the benefit of a national of the country to which the license was granted. These licenses were granted after the governments of the countries involved gave adequate guarantees and assurances to the United States that the terms and conditions of the general licenses would be strictly adhered to. The basic condition imposed was the obvious one; that under the license no transactions by, on behalf of, or pursuant to the direction of any blocked country or blocked national (other than the country to which the general license was granted or national thereof), could be consummated.[85]

As to Transactions. Many types of transactions carried on within the United States, even though on behalf of nationals of the Axis nations themselves, were not in any way inimical to the purpose of the Control, and for these it was deemed undesirable to require individual licenses. The very first general license issued by the Control was of this nature and permitted a person in the United States owing

[82] An elaborate program permitting trade with China on restrictive terms compatible with the fact that much of its commercial area was occupied by an aggressor was provided for by General License but was rendered largely abortive by the outbreak of war. General License No. 58, 6 FED. REG. 3723, 5802 (1941), 9 *id.* 2849 (1944).

[83] Regulations—Restricted Exportations and Importations, T. D. 50433, as amended, 6 FED. REG. 3672, 6585 (1941), 7 *id.* 304, 2777 (1942), 9 *id.* 1003 (1944).

[84] General License No. 49, Sweden, 6 FED. REG. 3057 (1941), 9 *id.* 2084 (1944); General License No. 50, Switzerland, 6 *id.* 3057 (1941), 9 *id.* 2084 (1944); General License No. 52, Spain, 6 *id.* 3404 (1941), 9 *id.* 2084 (1944); and General License No. 70, Portugal, 6 *id.* 4046 (1941), 9 *id.* 2084 (1944).

[85] U. S. TREAS. DEP'T, *supra* note 56, at 12.

money to a blocked national to pay the funds into a blocked banking account in the name of that national.[86] A large number of unobjectionable transactions were thus facilitated. The license did not, however, authorize any foreign exchange transaction or any payment to a blocked account which was a part of another or different transaction requiring a license. By these licenses the blocked nationals were not required to bear the risk of fluctuations of the market, nor was a debtor forced to remain a debtor with the responsibilities of holding blocked funds. The banks of course, into which accounts were paid, held them as blocked funds and could make no payments without a license.

Many other general licenses relating to transactions were similarly concerned with permitting blocked nationals and their agents to manage or liquidate property and to meet the necessary expenses and taxes.[87] Some, however, covered distinct fields of considerable importance. The questions of living expense remittances to blocked countries,[88] of handling estates and trusts,[89] and of servicing life insurance policies[90] were all dealt with extensively by transactional licenses.

Blanket licenses were given to certain reputable institutions within the United States to carry on specific routine matters. Under such a license a bank, for example, might collect dividends, issue letters of credit, make payment of drafts and the like. The conditions in the blanket were sufficiently restrictive to limit activities to the type of transaction which had Treasury approval.

General Rulings.

The general rulings define types of transactions prohibited or permitted under the freezing regulations. A few rulings were answers to inquiries and were wholly interpretative.[91] Some related to temporary situations or to matters important to only a few persons. Others, however, were the medium through which were instituted broad programs of the Control.[92] It is impossible to consider all of the problems dealt with through the general rulings. The principal programs, however, initiated, defined or amplified by the general rulings are significant and may be examined, rather than the rulings themselves, for understanding of the work of the Control.

[86] General License No. 1, 5 FED. REG. 1616, 1695 (1940), 6 *id.* 2907 (1941). See also General License No. 1A, 6 *id.* 5180, setting a similar procedure for securities accounts.

[87] E.g., General License No. 2, 5 FED. REG. 1695, 2309 (1940), 6 *id.* 3214, 5180, 6405 (1941), 9 *id.* 2083 (1944); General License No. 4, 5 *id.* 1696, 2132, 2806 (1940); General License No. 27, 5 *id.* 2807 (1940), 6 *id.* 3214 (1941).

[88] General License No. 32, 5 FED. REG. 3531 (1940), 6 *id.* 748, 5467 (1941), 8 *id.* 1834 (1943), 9 *id.* 7379 (1944); General License No. 32A, 9 *id.* 1581, 3489, 5975, 10559 (1944); General License No. 33, 5 *id.* 3634 (1940), 6 *id.* 748, 5468 (1941); General License No. 75, 6 *id.* 5804 (1941), 7 *id.* 147 (1942), 9 *id.* 2849.

[89] General License No. 30, 5 *id.* 2863 (1940); General License No. 30A, 7 *id.* 8633 (1942). See also Public Circular No. 20, 7 *id.* 8632 (1942).

[90] General License No. 86, 8 FED. REG. 9320 (1943).

[91] The function of such rulings was later carried on by "Public Circulars" and "Public Interpretations."

[92] Two important general rulings are discussed in other parts of this article: General Ruling No. 17, *supra*, p. 31, and General Ruling No. 11, *post*, pp. 57-58.

Program as to Securities. It was realized at an early period that if the Control were to be effective in preventing assets of invaded countries falling into the hands of invaders from being liquidated by them for their own benefit, a method had to be found to prevent the disposition of looted securities.[93] No efforts made within this country could prevent the physical seizure of securities which might be within an invaded country. The problem was to prevent recognition within the United States of the change of title or other beneficial interest of a blocked national in any securities whether the securities themselves were within or without the United States.

The first part of a program to accomplish these aims related to the prohibition of the transfer or dealing with respect to any security registered in the name of a national of any of the countries which were blocked. No registrar or transfer agent within this country could, without a license, change the registration of any security registered in the name of a blocked national.[94] It did not matter even if documentary evidence indicated that transfer had been made or contemplated long before the date of invasion. If the request for change of registration came after the blocking of the country of which the registered owner was a national, that blocked national remained the registered owner unless a license were granted. Although originally commenced as protection of property of the invaded countries, the rule extended to all blocked nationals. It will be observed, however, that these measures met but part of the problem since they did not affect bearer securities. To meet this particular problem the program included an overall system of examining securities brought into the United States.[95] The import controls were based upon the premise that it would be insufficient if the prohibitions of the Control related only to importation of securities from the blocked areas, since securities could enter the United States through the channels of neutral nations which did not maintain safeguards considered adequate.[96] Beginning in June, 1940, the Control provided that all securities entering the United States from any foreign country must be deposited in a Federal Reserve Bank from which they could be released for general use and circulation only upon satisfactory proof that they were free from any Axis taint.[97] Here again the Control was in close cooperation with other agencies of the Government and particularly the United States Customs and Post Office officials, the former of whom examined the effects of incoming passengers and the latter of whom saw that securities contained in incoming mail were deposited with a Federal Reserve Bank.

[93] For an extended discussion of the problem, see U. S. TREAS. DEP'T, *op. cit. supra* note 56, at 20.

[94] General Ruling No. 3, 5 FED. REG. 2133, 2284 (1940).

[95] General Ruling No. 5, 5 FED. REG. 2159 (1940), 7 *id.* 3770 (1942), 8 *id.* 12286 (1943).

[96] U. S. TREAS. DEP'T, *supra* note 56, at 21.

[97] The provisions of General Ruling No. 5 were later extended to securities coming from the Philippine Islands and the Canal Zone [General Ruling No. 7, 5 FED. REG. 3747 (1940)] but were made inapplicable to securities from Great Britain, Canada, Newfoundland, or Bermuda (General Ruling No. 5, paragraph (6)) because of the controls maintained by the authorities in those areas.

Securities thus held by a Federal Reserve Bank, if not released, could nevertheless be transferred to any domestic bank to be held in a special blocked account.[98] Dividends and interest could be collected and placed in the account and the securities could even be sold if the proceeds went into the account.[99] Banks might also deduct the established amount of their fees for the handling of a security account.

In part the problem of dealing with securities physically located abroad was simplified by a certain European practice of requiring the placing of a tax stamp on securities held in such countries. This stamp in itself showed that the securities came from or had been held in a foreign country. The Executive Order (Section 2A) expressly prohibited any transactions in such securities except under license. When the title of stamped securities had been satisfactorily established, the Control attached to them an official certificate called Form TFEL-2, which signified that the securities could be traded freely.[100] So effective was the control of stamped securities that Germany, it is known, took a special census of all securities that could not be thus identified.[101]

Another part of the program related to securities issued in the United States by blocked countries of Europe. From time to time payments of coupons on such securities became due and, if matured, the face amount of the securities became payable. Certain of the countries occupied by the enemy which had such dollar issues outstanding had funds within the United States which the issuing country desired to use in maintaining the fiscal service on these securities. The Treasury has, in general, been willing to authorize the use of these funds for the payment or redemption of such securities. However, the question immediately arose as to which securities might legitimately be paid and which could not be paid except, of course, into blocked accounts. Here again, by the use of Form TFEL-2, the Control facilitated the operation of normal payment of coupons and the redemption of securities while at the same time it prevented the Axis from realizing on seized securities.[102]

It was also recognized that the sale of looted securities might be made from outside of the United States to a person within the United States, and to prevent this the freezing order prohibited the acquisition by or transfer to any person within the United States of any security or evidence thereof which was outside the United States.[103] This prevented the transfer by cable or otherwise; the destruction of the security and the request for reissue within the United States.

[98] General Ruling No. 6, 5 FED. REG. 2807 (1940), 6 *id.* 3174 (1941), 8 *id.* 6595 (1943).

[99] General License No. 29, 5 FED. REG. 2807 (1940), 6 *id.* 3174 (1941), 7 *id.* 9119 (1942), 8 *id.* 6595 (1943).

[100] General License No. 25, 5 FED. REG. 2671 (1940), 6 *id.* 3214 (1941).

[101] U. S. TREAS. DEP'T, *op. cit. supra* note 56, at 22.

[102] Public Circular No. 6, 6 FED. REG. 4730 (1941). The technique of requiring Form TFEL-2 to be affixed was also employed to prevent looting of Philippine securities by the Japanese. General Ruling No. 10, 7 *id.* 305 (1942); Press Release No. 29-56, January 14, 1942, DOCUMENTS, *supra* note 23, at 115.

[103] EXEC. ORDER No. 8389, §2A(2). Acquisition of securities in Great Britain, Canada, Newfoundland, or Bermuda, and to a limited extent of those in the generally licensed trade area was eventually permitted by general license. General License No. 87, 8 FED. REG. 10656 (1943).

Currency.

For many years there has always been within the countries of Europe a large amount of American currency, accumulated through the normal methods of trade and the sending of cash remittances from the United States. Seizure by the Axis of this currency, if there were means of redeeming it, would have given substantial purchasing power to the Axis. The question, therefore, was how to make American currency outside the United States valueless and prevent it from coming into the United States. The Treasury engaged upon a program which, to those who failed to understand its import, caused great astonishment. The Department did everything practical to depreciate the value of the American dollar bill in Europe and elsewhere in the world.[104] Of course, if the Axis could find means of getting looted dollars into the United States, they would be as good as any other. There would be no way of identifying them. A general ruling was put out that currency brought into the United States must be deposited in a Federal Reserve Bank.[105] This was later combined with the analogous ruling relating to securities.[106] To avoid undue hardship a very small amount of currency was permitted to be brought into the United States for personal expenditure. Again the Customs Service and the Post Office Department have been the first line of defense in preventing importation.

In those friendly countries where the American dollar was circulated more or less in regular trade, the Treasury announced that it would entertain applications for the release of currency forwarded by such countries but would not permit it to be redeemed if Axis taint was not proven to be absent.[107]

Litigated Matters.

It is not necessary to infer what attitude the Treasury assumed in regard to matters in litigation, for that Department has been at pains to explain its position, in court,[108] in the press[109] and in a general ruling.[110]

A brief explanation of the situation which the Treasury faced in regard to litigation involving blocked nationals and blocked funds is necessary for an understanding of the Treasury's position. Most transactions for which a specific license would be required were voluntary; a blocked national desired to enter into some transaction by which he would receive funds or pay them out. In considering an application for a license to effect such a transaction, the Control had before it a

[104] U. S. TREAS. DEP'T, *op. cit. supra* note 56, at 24.

[105] General Ruling No. 6A, 7 FED. REG. 2083 (1942), 8 *id.* 12287 (1943).

[106] General Ruling No. 5 (as amended September 3, 1943), 8 *id.* 12286 (1943). A similar program was also established with respect to checks and other negotiable instruments. General Ruling No. 5A, 8 *id.* 9320 (1943).

[107] U. S. TREAS. DEP'T, *op. cit. supra* note 56, at 25.

[108] Commission for Polish Relief, Ltd. v. Banca Nationala a Rumaniei (National Bank of Rumania), 268 N. Y. 332, 43 N. E. (2d) 345 (1942).

[109] Press Release No. 31-28, April 21, 1942, DOCUMENTS, *supra* note 23, at 122; AMERICAN BANKER, December 11, 1942, p. 3, col. 2.

[110] General Ruling No. 12, 7 FED. REG. 2991 (1942).

"pay order," *i.e.*, a consent by the party to be charged. In other cases where some one claimed a right to enter into a transaction to receive funds from a blocked national, the blocked national might not have been in a position to give his consent or he might have denied any obligation. Had the Treasury granted a license, which was purely permissive, to the claimant, the claim still would not have been paid, for it could not have been enforced. To enforce an unadmitted or disputed claim the judgment of a competent court is necessary.

The Treasury in general refused to consider any application for a license solely to assert a claim but insisted as a condition precedent to consideration of an application, either that the blocked national to be charged had consented to the transfer or that a judgment had been entered against him.[111] A license at any time before final judgment would constitute a Treasury "permit" for the completion of the transaction which might have no legal justification and in any event without entry of a judgment could not be enforced against the blocked national or his property. The Treasury created no prohibitions against a suit wherein the judgment, which might thereafter be entered, could be satisfied only out of blocked funds; neither did it assist a claimant to bring such a suit.

If the blocked national against whom suit was brought were within the United States, jurisdiction could be obtained by personal service. A serious problem, however, arose in the event that the defendant, a blocked national, was not within the United States, so that no jurisdiction *in personam* could be obtained, but jurisdiction *in rem* (or as sometimes denominated, *quasi in rem*) could be obtained by attachment or other appropriate process directed against his property within the jurisdiction. Such a case would arise when the defendant, let it be assumed, was in enemy occupied territory.

Without a license, was attachment possible under the freezing regulations? The Executive Order, as officially interpreted by the Treasury, forbade any transfer of blocked funds without a Treasury license.[112] "Transfer,"[113] as used, included the creation of any right, or any interest, in blocked funds in any way derogatory to the right, title or interest which the blocked national had in the property in question prior to the imposition of the freezing regulations. Therefore, an attachment or even a judgment which might follow could not do as to blocked property what the owner thereof could not voluntarily do.[114] What then were the rights of litigants seeking

[111] "Indeed the Treasury regards the Courts as the appropriate place to decide disputed claims and suggested to parties that they adjudicate such claims before applying for a license to permit the transfer of funds. The judgment was then regarded by the Treasury as the equivalent of a voluntary payment order without the creation or transfer of any vested interest, and a license was issued or denied on the same principles of policy as those governing voluntary transfers of blocked assets." Brief for United States, *amicus curiae*, p. 14, in the Polish Relief case, *supra* note 108.

[112] General Ruling No. 12, 7 FED. REG. 2991 (1942).

[113] *Ibid.*, par. (5)(a).

[114] *Ibid.*, paragraph (4): "Any transfer affected by the Order and/or this general ruling and involved in, or arising out of, any action or proceeding in any Court within the United States shall, so far as affected by the Order and/or this general ruling, be valid and enforceable for the purpose of determining for the parties to the action or proceeding the rights and liabilities therein litigated; provided, however,

to secure satisfaction of claims out of blocked property of a national who was not personally subject to the jurisdiction of the court, and what were the rights and obligations of the officer whose duty it was under normal process of court "to attach" blocked property? It seemed axiomatic that the rights of the officer (sheriff, marshal or constable) in property sought to be attached could not become by such process greater than the rights of the owner. By the blocking of the owner's property his title was not defeased; he could express his wish to transfer, he could execute a purported assignment valid in form or take other action looking to a transfer, but he could create no interest whatever in his property, he could alienate nothing, without a license. Since the blocked national could exercise but limited powers in respect to his property, was his remaining or residual interest attachable? Was the right or interest which the levying or attaching officer acquired merely the privilege to apply for a license, since this was one privilege which clearly the owner of the property retained, or were other interests acquired? In such a case as here considered, instituted without personal service, or process deemed its equivalent, the jurisdiction of a court must be acquired, if at all, by the attachment of the defendant's property. The question, therefore, immediately arose, could jurisdiction be founded upon "seizure subject to license," upon "hypothetical seizure," or could a court acquire jurisdiction only in the event that it had "dispositive dominion"[115] over the blocked property involved.

Certain other questions arose in this type of litigation which need not here be considered since they were problems of the applicability or interpretation of the procedural laws of the particular state in which the action was brought.[116]

The Treasury confined itself to questions involving the freezing order as applied to litigation. The position of the Treasury may be reduced to simple propositions:[117]

(1) No legal proceedings could give any interest whatever in blocked property in the absence of a Treasury license.

(2) No license was required for any one who sought to institute judicial proceedings for the ultimate determination of a disputed question, even though the suit involved a blocked national and blocked funds.

Whether or not a court could acquire jurisdiction by attachment or by other similar process directed against blocked funds was for the court itself to decide. The Treasury said:

---

that no attachment, judgment, decree, lien, execution, garnishment, or other judicial process shall confer or create a greater right, power, or privilege with respect to, or interest in, any property in a blocked account than the owner of such property could create or confer by voluntary act prior to the issuance of an appropriate license." See also note 111 *supra*.

[115] The defendant in the Polish Relief case, *supra* note 108, had contended that no attachment could be valid unless the Court had "dispositive dominion" over the property.

[116] These problems related in particular to requirements (1) as to the method of giving notice to the defendant of the institution of an action against him (by attachment of his property) and (2) as to the entry of a default judgment if he failed to appear or answer.

[117] General Ruling No. 12, 7 FED. REG. 2991 (1942). Also, see Brief for United States, *amicus curiae*, in the Polish Relief case, *supra* note 108.

". . . The Government believes that the interest of private litigants in state courts can be served without interference with the freezing control program. However, the interest of the Government is paramount to the rights of private litigants in this field and should this Court be of the view that under the New York law there cannot be a valid attachment of the limited interests* herein suggested, then the Government must reluctantly take the position that in the absence of further authorization under the freezing control, there can be no attachable interest under New York law with respect to blocked assets."[118] *[The limitation imposed by the freezing order on the attributes of ownership in property was on the power of alienation. The exercise of this power was contingent on the issuance of a Treasury license.]

The case in which the Treasury filed the brief containing this statement, had been commenced by attachment against blocked funds in New York. The attaching creditor, a domestic membership corporation, was the ultimate assignee of a foreign claimant. The defendant had not been personally served but had appeared specially to contest the jurisdiction of the court. In deciding the fundamental question whether or not jurisdiction could be acquired by attachment of blocked funds, the Court divided sharply 4 to 3.

The division was not on the question of the power of the Foreign Funds Control to prevent transfers (both majority and minority concurred as to that proposition) but on the question, whether or not the Court could acquire jurisdiction by an unlicensed attachment. The minority was of the opinion that an attachment could not, in the absence of a license to transfer the property, have sufficient validity to give jurisdiction over the case to the Court, and conversely, a decision that an attachment without such a license had sufficient validity for this purpose would be an indication that some rights in the blocked property had been transferred by the attachment process and thereby unlicensed trading in blocked assets would be permitted. The minority said (at page 349):

"What the plaintiff is seeking here is a res sufficiently illusory not to fall within the all-inclusive prohibition of the Executive Order and at the same time to be sufficiently substantial to afford a basis for jurisdiction. In my opinion such inconsistency seeks the impossible."

In short the minority believed there could be no attachment of blocked funds whatever without a Treasury license.

The majority held that the rights of the blocked national in his property even without a Treasury license were an "attachable interest." The majority said (at page 347):

". . . The lien of an attachment is always hypothetical in some degree. A 'seizure subject to license' was, we think, sufficient for the purpose of jurisdiction in rem over the deposits in question. . . .

". . . As amicus curiae, the government of the United States informs us of its decision that the levies of this attachment do not offend any national policy implied by the Executive Order. We do not presume to contradict this executive determination. . . ."

[118] *Ibid.*, at p. 53 of Brief.

The decision clearly marks the line between the functions of the Court and those of Treasury. In absence of a pay order, *i.e.* consent of the parties, two elements are required as conditions precedent for a transfer of title to blocked assets. (1) A determination dehors the freezing order of the legal right of the plaintiff to compel a transfer of the defendant's property, (2) a determination that the transfer of the property is not contrary to public policy as expressed in the Executive Order and Regulations under Section 5(b) of the Trading with the Enemy Act. The Courts were not empowered to make the determination as to the latter question. The Treasury has not presumed to make a determination of the former.

The Court decided merely the question before it, which was that there was an attachable interest in blocked funds. It did not decide other questions which might arise by reason of this determination. What rights does an attachment creditor retain in the event that no license is granted for the satisfaction of his judgment out of the blocked funds? It appears that the Treasury has seldom licensed delivery to a sheriff of attached blocked property and that where it has done so, it was prepared to license also the judgment if obtained. Its position has been that no delivery can lawfully be made to a sheriff of blocked property without a license.

Other questions likely to arise relate to the rights of a subsequent attaching creditor who might receive a license for payment of a judgment which would exhaust the blocked property available. Could such a judgment be satisfied in view of the fact that there was a prior judgment on attachment against the same fund for which no license had been granted? Likewise, if a license were granted, could an attachment garnishee on direction of the owner of the attached property make payment without liability under the laws of the state where the attachment action was pending? Also what is the effect upon an outstanding attachment of a subsequent vesting order? Similar questions which might arise can easily be imagined. Consideration of the general policy of immobilization pursued by the Treasury as well as examination of explicit statements appearing in the documents relating to litigation, leads only to the assumption that the Treasury's attitude would be that neither attachments nor judgments in anywise change the rights or interest in blocked funds, unless and until a license is granted. The Treasury's position has thus been stated:

". . . While the Federal restrictions may leave some scope for the operation of state attachment laws, *e.g.*, insofar as the attachment provides a jurisdictional basis for judgment, the attachment under state laws must fall short of creating any legal interest or relation that collides with the Federal regulation of foreign-owned property. The creation of any legal interest or relation by attachment beyond what could be created by unlicensed voluntary assignment conflicts with the applicable Federal law. . . .

"The Federal concern is that the effect, if any, of the attachment be in complete subordination to the Federal control over the assets involved. . . ."[119]

[119] *Ibid.*, at 38.

No attached blocked funds have been paid during the war without a Treasury license.[120] It must, however, be admitted that some matters relating to the future or ultimate rights of the parties to litigation involving blocked funds are not clear. One could not say with assurance what rights, if any, will carry over into the future. If without further clarification, freezing control should cease, it would seem that confusion would be inevitable. Many litigants would necessarily seek a decision whether proceedings in attachment other than those which have ended in a judgment licensed for satisfaction,[121] are null and void, or whether attaching creditors upon the remission of the control revert to such rights as they would have had if the attachment had been against other than blocked funds, or whether they have other or different rights.[122] It is hoped that these questions of supreme interest to parties in litigation can be authoritatively settled before freezing control shall have ended.

The Census of Foreign Property within the United States—Form TFR-300.

During the period prior to Pearl Harbor a project to secure information basic to the whole freezing program was undertaken. With the freezing of Norway and Denmark, the Treasury required reports of the assets within the United States belonging to those countries and their nationals. Reports were similarly required for the assets of other countries as those countries were frozen until June 14, 1941. At this time, as aforesaid, all occupied European countries not previously frozen, the European aggressor nations, and the European neutral nations, were blocked under the Order. A few weeks thereafter, China and Japan were likewise included.

The situation as of June 14, 1941, made imperative a comprehensive survey to determine the amount of foreign property existing in the United States, not only for the countries blocked, but for *all* other countries as well.[123] Certain reasons are obvious why this census should apply to the property of non-blocked countries, even though friendly, as well as those affected by the Order. The course of the

[120] It should be noted that an appropriate license at any time will validate or make enforceable a transfer and this is true even if a prior application for a license by the same person (or another) for the same transfer has been denied. (General Ruling No. 12, Sec. 3.) Thus even if the payment of a judgment out of blocked funds has been denied, it seems clearly the Treasury's position that a license at any future time would enable the judgment to be enforced.

[121] The Treasury filed a brief *amicus curiae* with the New York State Court of Appeals in the case of Singer v. Yokohama Specie Bank Ltd. and Elliott v. Bell, as Superintendent of Banks of New York, further emphasizing its position as to transfers of blocked property. On Nov. 30, 1944, the Court handed down a decision. Shortly thereafter the defendant Elliott v. Bell, as Superintendent of Banks, made application for re-argument. A further memorandum was submitted by the Treasury in support of this application. Since the matter is thus pending before the Courts as of the time of this article, no comment is made on the issues involved.

[122] It does not appear that the Treasury has made any announcement concerning actions in admiralty. It may also be noted that under General Ruling 12, "the term 'property' is broad but by and large does not include mere chattels or real property." Press Release No. 31-28, DOCUMENTS, *supra* note 23, at 122, 125. As to liquidations, see "Blocked Businesses Other Than Those Vested," *post* p. 54.

[123] Regulations of April 10, 1940, as amended, 6 FED. REG. 2905, 3722 (1941). Later, provision was made for reporting on Form TFR-300 with respect to property of Japanese nationals residing in the United State [Public Circular No. 4A, 7 *id.* 383 (1942)]; of nationals of the Philippine Islands when they were invaded [Public Circular No. 4B, 7 *id.* 847 (1942)], and of various kinds of nationals in situations of special interest to the Treasury [Public Circular No. 4C, 7 *id.* 7274, 7428 (1942)].

war and what nations might still be overrun could not then be foreseen. Chains of title might run through various countries including friendly, unblocked countries. Axis agents might be operating in any country.

The census was to show not only the amount of property within the United States but the identity of the persons holding it, their relation to it, and the type and kind of property. This census was to be of a scope and detail unprecedented in the United States. The Treasury regulation implementing the Executive Order provided for reports on Form TFR-300 and a public circular[124] was issued, supplemented by questions and answers as to the manner and method in which these reports should be made.[125]

Reports were required from all persons holding or controlling any type of property in which there was any foreign interest, direct or indirect. All corporations or other business organizations issuing shares, bonds, or other securities were required to report the interest of each foreign national as appeared from their books. Every agent or representative in the United States of any foreign country, or of any foreign national, had to report any property which he held for his principal. Where two or more nationals had an interest in the same property, a separate report was required for each national.

Also all "nationals of foreign countries" living within the United States were required to report with respect to any property subject to the jurisdiction of the United States in which they had an interest. The effect of this requirement, however, was greatly reduced by certain general licenses.[126] No one was obliged to report if he had been domiciled in and a resident of the United States at all times on and since June 17, 1940, except nationals of certain invaded countries whose period of uninterrupted residence had to begin at a somewhat earlier date (the date of freezing as to them).

In order to determine the amount of property which might have been transferred from the beginning of freezing, and to enable the government to trace such transfers should that be necessary, all persons reporting were required to specify the amount of property on two separate dates, June 1, 1940, and June 14, 1941. If reportable property was held on one date but not on the other, a report was nevertheless required. No one was required to report property less than $1,000 in value excepting property of unascertainable value, such as patents.

[124] Public Circular No. 4, 6 FED. REG. 4196 (1941).

[125] "Questions and Answers regarding United States Treasury Department Form TFR-300, Series 'A' through Series 'I,' prepared after Consultation with the Treasury Department by the Foreign Exchange Committee, New York, National Foreign Trade Council, Inc., New York, National Council of American Importers, Inc., New York, and by Insurance Representatives." (Indexed and reprinted for distribution with an Introduction by Guaranty Trust Company of New York.) Various committees or groups representing business interests consulted the Treasury on specific questions of interest to them regarding reporting requirements. The questions and answers were published in various journals and publicized through various associations. They were then collected and published as above cited.

[126] General License No. 42 (as issued June 14, 1941), 6 FED. REG. 2907 (1941); General License No. 68 (as issued July 26, 1941), 6 *id.* 3726 (1941). See also General License No. 28 (as amended September 9, 1941), 6 *id.* 4663 (1941).

Contrary to some misunderstanding at the time, this was not an "informer's report." The persons required to report were only those who themselves had some interest in, or obligation with respect to, property in which a national had an interest. No one was asked, nor was it even desired that any one should give to the Treasury his suspicions or beliefs as to property held by another person in which a national of a blocked country might have an interest.

The Treasury received nearly 600,000 reports, including 150,000 on securities registered in the names of nationals of foreign countries; 135,000 on bank accounts, 65,000 on securities held in custody by banks and brokers; and 10,000 on safe deposit boxes in which nationals had an interest. In all, it was found that the value of foreign property within the United States was about $13,000,000,000, and more than $7,000,000,000 was the property of blocked countries.[127] The significance of this report in the work of the Control generally and in conection with particular matters, as the location of materials strategic in the war effort, has already been the subject of magazine and newspaper comment. Now it is to be hoped that the Treasury will see fit to publish such information concerning the property within the United States as may not be of confidential nature, in order that it may be more readily available to the Congress and other branches of the Government in preparation for post-war settlements and rehabilitation, and to those persons and corporations, generally, who would find the information valuable for such purposes as planning post-war trade.[128]

Vesting.

On February 16, 1942, one of the new powers in the First War Powers Act was exercised for the first time when the Secretary of the Treasury, to whom the President had delegated all powers under Section 5(b), as amended by Title III of the Act, vested in himself ninety-seven percent of the outstanding shares of General Aniline and Film Corporation of Delaware, an organization doing annually a business of about $60,000,000, employing some 8,000 persons, and engaged in the manufacture of materials vital to the prosecution of the war. The announcement made at the time by the Secretary of the Treasury indicated he considered that the property taken under the first vesting order was owned beneficially by enemies,[129] although a majority of the shares of stock vested was registered in the name of Swiss and Dutch corporations and a few only in the names of German citizens.

The fact that most of the stock of the company was in names other than those of German nationals was not at all surprising. Anonymous investment within the United States had been a policy of foreigners for years prior to the war. Persons fearful of confiscation endeavored to place their property out of reach of the Axis,

[127] U. S. TREAS. DEP'T, *op. cit. supra* note 56, at 39.
[128] In the Spring of 1943, the Treasury took a census of American property abroad, *post* p. 58.
[129] U. S. TREAS. DEP'T, Press Service No. 30-33, February 16, 1942.

not only by transference to the United States or other countries believed to be safe, but by concealing the ownership as well. Anonymous investment was, however, not confined to persons fearful of the Axis, but, as is now known, was employed by the Axis itself and its supporters, who doubtless made anonymity a defense against the possibility of future conflict with America. Some of these efforts at concealment were sinister and hid the intention of the Axis to secure control of important American business units as safe investment for its funds or for an ulterior use.

Concealment of Ownership.

Whatever the purpose, be it sinister or innocent, many devices were used which, as the inevitable war approached, became more devious and complicated, and were limited only by the ingenuity of frightened businessmen or unscrupulous Axis agents, as the case might be. Much sympathy may be expressed for the acts of innocent victims of aggression, but such devices for concealment tended to interfere with the war effort. Whether for economic defense of the United States, which would include the protection of the property interests of those who could not protect themselves, or for economic warfare, to injure the Axis wherever possible, the government was forced to look through the device, whatever it might be, and act in accordance with the findings of beneficial ownership.

Limitations in the Trading with the enemy Act as used in World War I had been removed. This broadening of the power of seizure was necessary for the protection of the United States in World War II[130] since the devices for concealment, frequently involving chains of title through several countries, were many and various.[131] These may be grouped conveniently under five general headings.

(1) *The Trust Device.* The technique here was to place stock ownership in trust with American citizens, but the apparent beneficial ownership was in citizens of neutral countries. In some instances the trust was of the spendthrift variety, in order to give a greater semblance of completely divorcing control from beneficial ownership. The ostensible beneficial owners within neutral countries might, in turn, be mere nominees for others unknown. Beneficiaries might shift, and new ones spring into existence upon the happening of certain events or upon appropriate declarations by the trustee.

(2) *The Unregistered Share Device.* This was probably the most common device employed for large holdings.[132] The technique used was to transfer to holding companies in various countries shares of stock, frequently representing majority ownership and control of American corporations. The stock of the holding companies usually consisted of bearer shares. Thus, any record of the ultimate owner-

[130] See Albert S. Davis, in N. Y. L. J., December 19, 1941, p. 2048; December 22, 1941, p. 2082. Also see Lourie, *"Enemy" Under the Trading with the Enemy Act and Some Problems of International Law* (1943) 42 MICH. L. REV. 384.

[131] U. S. TREAS. DEP'T, *op. cit. supra* note 56, at 30; Press Release No. 30-33, February 16, 1942.

[132] U. S. TREAS. DEP'T, *op. cit. supra* note 56, at 30.

ship was not available. Moreover, trading in such shares between the various holding companies was frequent, resulting in further confusion and concealment. In many cases the corporation in question never did have sufficient assets to purchase the American shares. In some instances, where the shares of the holding company were themselves held by another holding company, the shares of the first corporation were of the partly paid variety common in European corporate finance, and the second neutral corporation did not and never was intended to have sufficient assets to meet a call if made on such shares.

(3) *The Second Generation Device.* The technique here was to place, in the name of a person born in the United States of foreign parents, the property belonging to the parents or in which they had an interest. Children of very tender years, but American citizens because they were born within the United States, were found to have held nominal control over substantial organizations. This device was employed almost exclusively in Japanese business enterprises.

(4) *Control by Personal Fealty or Relationship.* The buying and selling of shares in American corporations by and between groups of persons all having blood or financial relations with certain other groups, which, in turn, controlled foreign corporations, was another pattern.[133] This appears to have been common in the chemical industry where the blocked foreign interest was primarily German. There was frequently no relation between the value at which these shares were sold on these "wash" sales, and the market or book value thereof.

(5) *The Option Device.* Corporate shares, particularly of newly formed corporations, were optioned to some foreign person or corporation, so that, although the record ownership might remain wholly American, the power of the optionee was the principal factor in the conduct of the business.

Fear has been expressed that the drastic action of vesting might create injuries to American citizens. The Secretary of the Treasury, by his announcement in connection with the first vesting order, indicated that the property was beneficially owned by others. Suppose he was mistaken. Is the claimant left without recourse? The order of vesting contained the two following provisions:

"Such property and any proceeds thereof shall be held in a special account pending further determination of the Secretary of the Treasury. This shall not be deemed to limit the power of the Secretary of the Treasury to return such property or the proceeds thereof, or to indicate that compensation will not be paid in lieu thereof, if and when it should be determined that such return or compensation should be made.

"Any person not a national of a foreign country designated in Executive Order No. 8389, as amended, asserting any interest in said shares of stock or any party asserting any claim as a result of this Order may file with the Secretary of the Treasury a notice of his claim, together with a request for hearing thereon, on Form TFVP-1 within one year of the date of this Order, or within such further time as may be allowed by the Secretary of the Treasury."[134]

[133] *Id.* at 30.

[134] Vesting Order pursuant to Section 5(b) of the Trading with the enemy Act, as amended, February 16, 1942, 7 FED. REG. 1046 (1942).

Also authority exists that when property is taken for public use under conditions constitutionally requiring compensation, an implied contractual right exists against the United States.[135] This is expressed in a bill now before Congress.[136] To deny that the government, particularly in wartime, could seize any property, by whomever owned, would be to limit the sovereignty of the United States, and to say that it no longer could exercise the right of eminent domain. The ultimate ownership, whether enemy, friendly alien, or loyal American, would merely determine the category for final treatment.[137] The vesting in itself was not confiscation. It was but another type of control wherein the title of the property was transferred to the United States. The property or the value thereof was still to be disposed of under whatever overall determination the government should adopt.[138]

Blocked Businesses Other Than Those Vested.

As this discussion relates only to the Foreign Funds Control, comments concerning the functions of the Alien Property Custodian are omitted. It may, however, be said that all functions not specifically exercised by the Alien Property Custodian over blocked business enterprises were retained by the Treasury. After the commencement of the war, the control over blocked foreign businesses became of greater significance. The control was exercised in various ways. In the first instance, a "do business" license could be granted by the Treasury. Some times such a license was not renewed or was revoked, in which event a liquidation would be the only recourse, and for this a license would be issued.[139] These liquidations were conducted as any liquidation of a business might be, but under Treasury supervision, and the funds secured from the liquidation were placed in blocked accounts in the name of the liquidated corporation. Usually, at the time of the issuance of a liquidating license, representatives of the United States were placed on the premises of the enterprise to supervise the liquidation process. This was desirable to prevent any person from removing or destroying property and, in particular, books and records. Altogether over five hundred businesses have thus been liquidated.

Another method of control was by the use of interventors.[140] In some cases a government representative was placed in a corporation to supervise its activities. His duty was to supervise but he could recommend any step to be taken, such as the vesting of the stock or other interests of undesirable individuals which would

[135] Jacobs v. United States, 290 U. S. 13 (1933); Portsmouth Harbor Land & Hotel Co. v. United States, 260 U. S. 327 (1922); cf. Yearsley v. W. A. Ross Construction Co., 309 U. S. 18 (1940); Hamburg-American Line Terminal & Navigation Co. v. United States, 277 U. S. 138 (1928); Crozier v. Fried. Krupp Aktiengesellschaft, 224 U. S. 290 (1911); see the Tucker Act, 24 STAT. 505 (1887), 28 U. S. C. (1940 ed.) §§41(20), 250.

[136] H. R. 5031, 78th Cong., 2d Sess. (June 15, 1944).

[137] Russian Volunteer Fleet v. United States, 282 U. S. 481 (1931).

[138] For further discussion as to the legal significance of vesting, see McNulty, *Constitutionality of Alien Property Controls, infra,* this symposium, p. 135; Dulles, *The Vesting Powers of the Alien Property Custodian* (1943) 28 CORN. L. Q. 245.

[139] U. S. TREAS. DEP'T, *op. cit. supra* note 56, at 34.

[140] *Id.* at 36.

then come under the control of the Alien Property Custodian. He might recommend the discharge of certain officers, the supervision of various trade activities, and other matters.

One other method was the reorganization of an enterprise without blocking.[141] Frequently it was possible to obtain the cooperation of the officers or directors of a blocked business enterprise. It must be understood that a great many businesses, whose activities thus had to be supervised, were essentially American owned. In some cases the American interest was dominant almost to the point of being exclusive. However, by reason of trade relations with Axis firms, as for example for the use of certain patents, the company might have become too dependent upon the Axis. As far as possible, the financial interests of American citizens, who had invested their money in such corporations, were preserved. In general, the effect of these methods of control was to eliminate from all business enterprises within the United States any influence or activity which was deemed inimical.

Patents.

The Treasury's census of foreign property in the United States disclosed some 65,000 foreign-held patents and agreements relating to patents. Until several months after the outbreak of the war, the control of blocked interests in such property rested in the Treasury Department, which proceeded in a manner consistent with its general policies toward blocked property.[142] In the spring of 1942, the President announced a policy that patents controlled directly or indirectly by the Axis would be made available for war preparation and other national needs of the United States.[143] Several months later a system for the use of these patents was announced by the Alien Property Custodian, who indicated that his policy was to release any restrictions which they might have imposed on American industry.[144] This program is outside the scope of these remarks but it may be added that the Treasury Department and the Alien Property Custodian have coordinated their efforts.[145] Fields not covered by the Custodian, such as the control of American patent interests in blocked countries, are dealt with by the Treasury.[146]

Directive Licenses.

Title III of the First War Powers Act contained a grant of power not encompassed in the Trading with the enemy Act of 1917. This was the power to issue directive licenses, which enabled the Secretary of the Treasury, under the President's

[141] *Id.* at 37.

[142] Public Circular No. 5 (as issued September 3, 1941), 6 FED. REG. 4587 (1941); General License No. 72 (as issued September 3 and amended October 23, 1941), 6 *id.* 4586, 5468 (1941).

[143] Leo T. Crowley, *Hearings before the Committee on Patents,* 78th Cong., 2d Sess., on S. 2303 and S. 2491 (1942) part 3, p. 1185.

[144] General Orders Nos. 2 and 3, June 15, 1942, 7 FED. REG. 4634, 4635 (1942). See U. S. ALIEN PROPERTY CUSTODIAN, PATENTS AT WORK (1943), *passim.*

[145] Public Circular No. 5 (as amended November 17, 1942), 7 FED. REG. 9481 (1942); General License No. 72 (as amended November 17, 1942), 7 *id.* 9481 (1942); General Orders Nos. 11, 12 and 13, 7 *id.* 9475-9476 (1942).

[146] General License No. 72A, 7 FED. REG. 9480 (1942).

delegation of authority, to direct any person or institution holding blocked property to dispose of it. It was found that property of various kinds, much of it of a strategic nature in the war effort,[147] could not be sold by the person having custody thereof, as he lacked the authority to make such a sale. Under the directive license without liability upon this holder the property could be placed, through sale, in normal commercial channels. Particular property might go directly to the Army or Navy or to persons having immediate need for it in the war effort. Also the moving of material, which could not otherwise have been sold, had the advantage of making space available in warehouses and on docks to meet the increased demands for the war effort. Not infrequently, it was found that a payment out of blocked property or a sale would be in the interest of the national who was the owner. Proceeds from a sale would be placed in a blocked account to the credit of the national having an interest in the property.

Important as this power has been on occasion, it has been used but sparingly.

HEMISPHERIC DEFENSE AND WORLD-WIDE CONTROLS IN ECONOMIC WARFARE

The Control recognized at an early period that economic defense could not be carried out merely by supervision of property within the United States. Control, in some manner, of transactions outside of the United States became, of course, more important after the declaration of war. The British had promptly recognized these factors and had published the "Statutory List," commonly known as the "black list," with whom persons under British control might not trade.

The Proclaimed List of Certain Blocked Nationals—"Black List."

By presidential proclamation,[148] the United States on July 17, 1941, created such a list,[149] which was officially known as "The Proclaimed List of Certain Blocked Nationals," but also commonly came to be referred to as the "black list." Supervision of financial and commercial transactions with the persons, natural or juridical, on the list was maintained by the Treasury Department,[150] although the list was published by the Secretary of State, acting in conjunction with the Secretaries of the Treasury and Commerce, the Attorney General, the Administrator of Export Control (now the Administrator of the Foreign Economic Administration) and the Coordinator of Commercial and Cultural Relations between the American Republics (later the Coordinator of Inter-American Affairs). Trading with any person on this list was subject to the penalties of the Trading with the enemy Act. It will be observed that in declaring a person outside the jurisdiction of the United States, wherever he might reside, to be a blocked national, the United States, in many instances, was by sanctions or embargo extending its authority over trade, to

[147] Press Release No. 29-37, January 4, 1942.

[148] PROCLAMATION No. 2497, 6 FED. REG. 3555 (1941).

[149] *Id.* at 3557.

[150] See General License No. 53, 6 FED. REG. 3556, 3946, 5180 (1941), 8 *id.* 4876, 6595 (1943), 9 *id.* 2084 (1944); Public Circular No. 12, 7 *id.* 334 (1942); Public Circular No, 18, 7 *id.* 2503 (1942); Public Circular No. 18A, 8 *id.* 4877 (1943); and Press Release No. 6, July 17, 1941, DOCUMENTS, *supra* note 23, at 105.

persons who were nationals of blocked countries solely by reason of facts other than citizenship or residence. The proclaimed list has been revised from time to time[151] and the names of certain persons who ceased their activity which was the occasion for their inclusion in the list have been deleted from it. Others have been added and as of the publication of January 12, 1945, this list contains 14,534 names. In this manner, a large amount of trade which might have been of benefit to the Axis has been prevented and the facilities within the United States, financial or otherwise, have been denied to the Axis and its well-wishers.

Inter-American Conference on Systems of Economic and Financial Control.

The most likely non-European area available for Axis financial operations and indirect trade for its benefit was South America and, although the "black list" was not confined to South America, the whole question of proper economic and financial controls and their integration throughout the western hemisphere was thoroughly explored in the Inter-American Conference on Systems of Economic and Financial Control held in Washington, commencing June 30, 1942.[152] Extensive recommendations were adopted for a coordinated program to further the war effort by preventing Axis use of facilities in this hemisphere.[153] Subsequent to the conference most nations of South America, in cooperation with the United States increased the effectiveness of their controls for their individual and collective defense and in general have extended hearty cooperation to a common end. The measures instituted by each country varied in accordance with the conditions and the degree of control deemed necessary. Nevertheless a fundamental unity of great mutual advantage has been created throughout a large part of the Western Hemisphere. Particularly has this unity and coordination been useful in the successful operation of the proclaimed list. Through this device particularly, and in correlative ways, three-cornered trade with the Axis through countries in the western hemisphere has been prevented.

Communications and Censorship.

The role of the Treasury relating to trade and communications with enemy nationals must not be overlooked. By the declaration of war, Section 3(a) of the Trading with the enemy Act was invoked, prohibiting trade and communication with the enemy.[154] The power under this section was delegated to the Secretary of the Treasury[155] and by him was integrated with that under Section 5(b) of the Act so that a license to consummate a transaction granted by the Treasury covered

[151] Revision VIII issued September 13, 1944, 9 FED. REG. 11389 (1944), is the most recent revision to which, as of this writing, the latest Cumulative Supplement is that of January 12, 1945, 10 *id.* 581 (1945).

[152] PAN AMERICAN UNION, PROCEEDINGS OF THE INTER-AMERICAN CONFERENCE ON SYSTEMS OF ECONOMIC AND FINANCIAL CONTROL (Congress and Conference Series No. 40, 1942) *passim;* U. S. TREAS. DEP'T, *op. cit. supra* note 56, *passim.*

[153] PAN AMERICAN UNION, *op. cit. supra* note 152, at Appendix J, p. 137.

[154] Section 3 of the Act of October 6, 1917, 40 STAT. 412, 50 U. S. C. APP. (Supp. 1941-1943) §3.

[155] General License under Section 3(a) of the Trading with the enemy Act, December 13, 1941, 6 FED. REG. 6420 (1941); see note 39 *supra* and text thereto.

both sections.[156] By definition the occupied countries were, even though friendly, treated as "enemy." Naturally trade and communication with an occupied country was in fact trade and communication with the enemy then in control. With the inception of the program relating to trade and communication, the director of censorship issued a complementary ruling in order that the work of the Office of Censorship in this connection should be coordinated.[157]

The general policy of the Treasury was to deny licenses for communication.[158] In addition, the Department was careful to prohibit Latin-American subsidiaries of American corporations from communicating with enemy nationals.[159]

United Nations Declaration.

The United Nations Declaration of January 5, 1943, gave warning to the world and particularly to persons in neutral countries that the United Nations reserve their rights to declare invalid any transfers in respect to property in or belonging to the occupied countries and their residents.[160] This obviously has been a great deterrent to the Axis in attempting to realize on confiscated property.

Thus in so far as it has been possible to do so, efforts have been made to use the financial weapon, so effectively used by Germany, to protect the interests of the United States and the United Nations and to wage war against the Axis.

Census of American Property Abroad—Form TFR-500.

As the area of the Control widened and particularly after the commencement of the war, the government's need for detailed knowledge of American interests and relationships abroad constantly increased. Such information was required not only for the operation of the Foreign Funds Control but for the work of other governmental agencies which involved economic, financial, and commercial relations with foreign countries and their nationals.[161] The Treasury, therefore, under a special regulation[162] required reports on Form TFR-500 with respect to all property in

[156] General Ruling No. 11, 7 FED. REG. 2168, 9119 (1942), 8 *id.* 12287, 7379 (1943); Press Release No. 30-79, March 18, 1942, DOCUMENTS, *supra* note 23, at 119.

[157] Office of Censorship, Communications Ruling No. 1, 7 FED. REG. 2172 (1942).

[158] Public Interpretation No. 4, DOCUMENTS, *supra* note 23, at 99.

[159] Public Circular No. 18, 7 FED. REG. 2503 (1942); Press Release No. 30-90, March 30, 1942, DOCUMENTS, *supra* note 23, at 121.

[160] Declaration of January 5, 1943, Regarding Forced Transfers of Property in Enemy-controlled Territory, DOCUMENTS, *supra* note 23, at 15; also Declaration on Gold Purchases, February 22, 1944, *ibid.*, 9 FED. REG. 2096 (1944). The viewpoint was confirmed by the United Nations at the Bretton Woods Conference; see *Official Text of Final Act of the United Nations Monetary and Financial Conference, Held at Bretton Woods, N. H., July 1 to 22, 1944* (Resolution VI), The Commercial & Financial Chronicle, July 27, 1944, pp. 388, 392-393.

[161] See *American-Owned Property Abroad,* an article prepared in the Treasury Department, appearing in FOREIGN COMMERCE WEEKLY, July 10, 1943, p. 3.

[162] Special Regulation No. 1, as amended, 8 FED. REG. 7438, 9744, 14277 (1943); detailed instructions for reporting were contained in Public Circular No. 22, 8 *id.* 7465, 9745, 14277 (1943) and an abridged circular of instructions. These circulars were supplemented by sets of questions and answers issued with the approval of the Control. See *Questions and Answers Regarding United States Treasury Department Form TFR-500,* AMERICAN BANKER, June 10 and August 10, 1943 (prepared by the Foreign Exchange Committee, New York); see also "TFR-500 Census of Property in Foreign Countries" (mimeographed), questions and answers prepared by the National Board of Fire Underwriters; also, "Questions and Answers" prepared by the Treasury Department covering reporting problems of interest to refugees from enemy and enemy-occupied countries.

foreign countries in which any person subject to the jurisdiction of the United States had an interest on May 31, 1943. This report applied not only to tangible property but to all intangible property issued or created by foreign countries or by persons within such countries, as, for example, bonds issued by a foreign government whether or not payable in dollars. Also currency or coin, financial securities, and negotiable instruments issued or created by the United States or any agency or person within the United States, came within the scope of the census whenever such property was situated in a foreign country or held in the custody of a person in a foreign country on the reporting date.

Here too it is hoped that the Treasury will at an appropriate time make readily available as much of this information as may be of significance to the Congress and to American business and financial interests. It appears that such a comprehensive digest may perhaps be expected as the Treasury, as of April 20, 1944, already has given a brief preliminary tabulation of the value of American owned property in foreign countries.[163] These figures were stated to be preliminary only and should be used with caution. They show that American individuals and firms have an investment of some $13,300,000,000 in foreign countries. Of this the American holdings in six enemy countries total $1,775,000,000—interests in Germany $1,290,000,000, in Italy $265,000,000, and in Japan $90,000,000. These figures, the Treasury warned, include in substantial amounts the assets of refugees here from blocked countries. These investments in enemy countries, as stated by the Treasury, more than triple the $450,000,000 known Axis holdings within the United States. The census figures also show that persons within the United States owned more than $2,000,000,000 in areas which the Axis has occupied.

THE REMISSION OF CONTROLS

The Treasury now faces a question as important as any which it has yet met—the remission of controls.[164] The policy of the United States in this respect is not yet fully apparent but already some preliminary steps have been taken.[165] Many of the policies followed by the Treasury must gradually be changed as the wartime conditions for which they were adopted change to peacetime conditions. It is clear to every one that remission of controls as soon as possible is highly desirable. It seems equally clear, however, that since sudden and complete return to normal conditions is not possible, sudden and complete cessation would be undesirable. Some have visualized continuation over a period of time as a part of exchange control.

[163] Press Release, No. 41-61.

[164] The speech of Orvis A. Schmidt, Acting Director, Foreign Funds Control, delivered before the Thirty-First National Foreign Trade Convention, Hotel Pennsylvania, New York City, October 9, 1944, shows the Treasury's concern with this problem and at the same time is the basis for any interpretation of Treasury attitude indicated in this section.

[165] General License No. 32A, 9 FED. REG. 1581, 3489, 5975, 10559 (1944), authorizing certain remittances to specified liberated areas in Sicily and Italy; Public Circular No. 25, 9 *id.* 12580 (1944), exempting from operation of General Ruling No. 11 certain communications with liberated Italy and certain acts and transactions; amendment of November 4, 1944 to General Ruling No. 11, 7 *id.* 9119 (1942), deleting portion of France within continental Europe from definition of "enemy territory."

While features which would normally be found in a system of foreign exchange control are not absent, this was not the purpose or function of the Foreign Funds Control and factors which might make necessary an exchange control should be considered separately and not confused with the main problems of "unfreezing."

For brief consideration of the problems involved, the property affected may again be considered under the three groups of (1) those countries occupied by the enemy, (2) the enemies themselves, and (3) the blocked neutral countries. The first category is most difficult as the purpose of remission combines two ideas—to assist the country to return to normal trade and production as rapidly as possible yet at the same time not permit the accomplishment of those transactions in respect to its property successfully prevented up to this time. A sudden complete remission of controls would lose in part the value of protection to property of invaded countries since many of the transactions for which licenses have been refused might still be executed if freezing were remitted. Not only would this be unfortunate for the beneficial owner of the property but the holder of the property, in most cases a bank or brokerage house, would be under the difficulty of deciding at its peril whether or not to execute the orders.

The enemy property does not present such a difficulty as one may assume that this will continue to be held until final determination is made for its disposition.

As to the blocked neutrals the principal difficulty is that of identifying and segregating the assets beneficially owned by the enemy. What policies will be adopted and what means to carry them out in relation to preventing the probable distribution throughout the world of German assets seeking avoidance of identification cannot now be said. One of the Bretton Woods resolutions recommended to all governments immediate measures to prevent the concealment of any assets belonging to, or alleged to belong to, the enemy, its leaders, their associates and collaborators, pointing out that efforts were now being made to conceal assets and to perpetuate German influence and power for future aggrandizement and world domination.[166] This resolution stated that transfers were being made to and through neutral countries.

These and other questions involving justice to the nations overrun in this war, efforts to aid these countries in their struggle back to freedom, and prevention of concealment by the Axis of assets throughout the world, make the remission of the controls a problem that merits immediate and thorough consideration.

[166] Resolution VI of the United Nations Monetary and Financial Conference, Bretton Woods, July, 1944, *supra* note 160.

ADMINISTRATIVE MACHINERY AND STEPS FOR THE LAWYER

FREDERICK W. EISNER*

TREASURY DEPARTMENT: FREEZING AND LICENSING

If a nation is being engulfed in war, it initiates forthwith control and supervision of all enemy property within its territory. Such measures are justified by inherent war powers of a sovereign state. We had been engaged in defensive economic warfare long before the military war actually started. Hence, we had to invent new forms of property control which, while designed to limit the capacity of our undeclared enemies to dispose of their properties and to protect assets within the United States of invaded countries, would not transgress the pale of international law prescribed for a nation not at war. Thus, the freezing regulations came into existence, administered by the Foreign Funds Control of the Treasury Department, and after the declaration of war, they were extended and interwoven with the wartime legislation relating to enemy property that falls within the administration of the Alien Property Custodian. Both are now co-existent, and both are of vital interest and importance to the practicing lawyer concerned with problems of enemy or alien property.

Foreign Funds Control, based upon Presidential Executive Order 8389 of April 10, 1940, as frequently amended, is a mere administrative measure, though, of course, supported by express statutory authorization.[1] The main objectives of Foreign Funds Control after the entrance of the United States into the war, have been defined as the complete severance of all financial and commercial intercourse with the enemy, especially of indirect and circuitous relations via neutral countries, the prevention of all intercourse or transactions which could benefit our enemies directly or indirectly, the elimination of all financial and commercial activities of persons within the United States whose influence or activities are deemed inimical to the security of the Western Hemisphere, and the frustration of attempts to use in this country assets looted from invaded countries.

The Foreign Funds Control is functioning under the Treasury Department, with central offices at Washington, D. C. It is organized into several divisions. The one most important to the practicing lawyer is the Licensing Division which de-

* LL.B., 1936, Fordham University; J.U.D., 1924, Freiburg University. Member of the New York Bar. Contributor to legal and banking periodicals.

[1] Sec. 5(b) of the Trading with the Enemy Act of Oct. 6, 1917, 40 STAT. 411, 50 U. S. C. APP. (Supp. III, 1941-1943) §616.

cides, in all more important cases, the question whether or not a license is to be granted for any proposed transaction. License applications for transactions of minor importance, or where the granting of the license appears to be clearly justified, are handled directly by the Federal Reserve Bank in the district in which the application has been filed. The twelve Federal Reserve Banks in the United States act as agents and field offices for the Foreign Funds Control, not only in those cases in which the banks themselves actually grant the licenses, but in all other cases as well, and no license application is being sent to the central office in Washington without a recommendation, positive or negative, by the Federal Reserve Bank.

As by far the greatest part of all transactions requiring a license are performed by banks and other financial institutions, these banks and institutions have to be depended upon for an efficient operation of the freezing control. In order to facilitate their work, the Federal Reserve Banks which are themselves constantly being kept advised by the Foreign Funds Control regarding the orders and policy of the Department, maintain close contact with the banks in their respective districts.

The practicing lawyer's problems in connection with the Foreign Funds Control are manifold. When consulted with regard to transactions involving either foreign nationals or assets, or rights in foreign countries, he has to consider whether the proposed transaction requires a license under the freezing regulations. Permitting his client to consummate a transaction without a license, if one is necessary, may subject the client not only to severe penalties, but the client may also find the contract entered into in violation of the freezing regulations unenforceable.

In examining whether the transaction comes under the freezing regulations, three different tests are to be applied, namely:

a. whether the transaction is being entered into by or on behalf of a designated foreign national (or country), or
b. whether the transaction involves property in which any such national (or country) has any interest of any kind, and
c. whether the transaction is one coming under sec. 1, subd. A to F of Executive Order 8389, as amended.

If either "a" or "b" coincide with "c," a license is required; otherwise, no license is necessary.[2]

The designated foreign nationals and countries, which were at the beginning of

[2] The lawyer will find it useful in working in this field to obtain a copy of the pamphlet, the last edition of which (March 30, 1944) runs to around 140 pages, issued by the Treasury Department and entitled "Documents Pertaining to Foreign Funds Control," hereinafter cited as "DOCUMENTS." This pamphlet contains the pertinent sections of the Trading with the Enemy Act, as amended, the pertinent Executive Orders, Regulations, Rulings, Licenses, Public Circulars, Public Interpretations, Press Releases and Proclamations (including that relating to the "Black List"). Editions of this pamphlet were published as of March 30, 1940, March 30, 1943, March 30, 1944; one may anticipate a new edition in the Spring of 1945. The pamphlet is obtainable from United States Treasury Department, Washington, D. C.

The lawyer will also find it useful to have access to services such as the C. C. H. War Law Service, Second Edition (1942), First Unit which is entitled "Statutes, Proclamations, Interpretations" (hereinafter cited as 1 C. C. H. War Law Serv.), and the Supplemental Unit entitled "Foreign Supplement." Access to the Federal Register facilitates keeping abreast of current developments.

the control only a few, comprise at present, roughly, all continental Europe (except Turkey), China, Japan and the states invaded by Japan. Any person who has been domiciled in, or a subject, citizen or resident of one of the respective countries on or since the date when the freezing regulations for that respective country became effective, is included in the definition of a foreign "national." Corporations, associations and partnerships are considered foreign nationals if either organized under the laws of the respective foreign country, or if they have their principal place of business in the same, or if they, or a substantial part of their stock, are controlled by the foreign countries or a national thereof. Any person to the extent that he acts or purports to act for the benefit or on behalf of a foreign national or country is likewise considered for this reason alone a foreign national, and so is any other person who there is reasonable cause to believe is a national as defined in the regulations.[3]

The term "property" is used in its broadest sense and includes all kinds of property interests, among others: checks, drafts, debts, bills of sale, options, judgments, insurance policies, and contracts of any nature whatsoever.[4]

The "transactions" as enumerated under A to F of Section 1 of Executive Order 8389 are transfers of credit between, and judgments by or to, banking institutions, transaction in foreign exchange and the export of gold or silver coin or currency, transfer or dealing in evidences of indebtedness or of ownership of property, and any transaction for the purpose, or which has the effect of, evading or avoiding the prohibitions contained in the order. Further prohibited are all dealings in securities which show any signs, present or past, of foreign stamps or imprints of a blocked country, and dealings in interests in securities if the attendant circumstances indicate that the latter are not physically situated within the United States.[5]

If, having applied the above tests, the lawyer reaches the conclusion that a license is necessary, he will have to prepare a license application which is to be filed with the appropriate Federal Reserve Bank on blanks supplied by them. Not infrequently, however, he will face a situation where a license application had already previously been filed by a third person, as a bank or a broker firm, and had been denied. This is not necessarily fatal to a new application. Experience shows that third persons frequently lack detailed knowledge of the facts of the situation, and that the lack of such details caused the denial of the license. While previous applications, and their disposition, must be mentioned in a new application, the principle of *res adjudicata* does not apply, and it does not make any difference whether or not the previous application had been submitted by the same or another person.

In drafting a license application, the lawyer should take special care that all facts which have any connection whatsoever with the matter in question, and which

[3] Relative to the statements in above paragraph, see U. S. TREAS. DEP'T, DOCUMENTS, *supra* note 2, at 5-9; 1 C. C. H. War Law Serv., *supra* note 2, ¶14,011.

[4] Full definition is given in 31 CODE FED. REGS. (Cum. Supp. 1944) §131.2 (c); DOCUMENTS, *supra* note 2, at 16.

[5] EXEC. ORDER No. 8389, §2, DOCUMENTS, *supra* note 2, at 5.

may be of any conceivable relevance to the decision, are included and set forth in the application. The procedure is not comparable to civil litigation where the lawyer is mainly interested in setting forth the points which appear to be in favor of his client's case, leaving it to the opposing party to stress the unfavorable points. Foreign Funds Control is not engaged in adjudicating private issues between litigants, but is an integral part of our economic war effort, and only if all relevant facts are brought to the attention of the Control is an appropriate decision likely to result. In strictly adhering to this principle, the lawyer will not only assist in the war effort, but he will also do most good to his client. An applicant may find his license application rejected because he did not set forth relevant facts which the Control knew from other sources, and the omissions may have been deemed sufficient to prove that the applicant cannot be considered trustworthy and reliable; and yet, the omitted facts may have been entirely harmless, and, if only properly set forth, may have in no way formed an obstacle to the granting of the application. Furthermore, the application should avoid to be argumentative, but should confine itself to the relevant facts.

If the license application be granted, it usually fixes a time within which the proposed transaction has to be executed, and the applicant is requested to file a report regarding such execution. In case the transaction cannot be executed within the period of time allotted, an extension of time, on showing of good reason, is usually granted almost as a matter of course.

The Control has made it a practice to extend an opportunity to an applicant, upon request, to discuss the merits of his application with an officer of the Control in case the application could not be granted. Such informal procedure offers to the lawyer an opportunity to explain in detail the facts which, in his opinion, justify the granting of the application. This is especially true in cases where a rejected application had been drawn by a person not learned in the law, or not familiar with the particular aspects of foreign funds control; in such cases a discussion of the facts in connection with a renewed application, prepared on the basis as outlined above, may lead toward the reversal of an unfavorable prior decision.

The regulations under Executive Order 8389 provide that the decision of the Secretary of the Treasury with respect to an application for a license shall be final.[6] While such regulation does not necessarily exclude the jurisdiction of the courts in cases where the refusal of a license appears arbitrary and unreasonable, the adjudication of the propriety of the granting or denying of a license does not lend itself to a court's procedure, and none appears to have been attempted.[6a] The administrative decisions in these matters are in such direct connection with and support of the war effort that in absence of abuse they cannot be interfered with by the courts while the war is being fought. However, the practical application of this doctrine may be somewhat different after the end of hostilities.

[6] 31 CODE FED. REGS. (Cum. Supp. 1944) §130.3.

[6a] Cf. Hartmann v. Fed. Res. Bank of Philadelphia, 55 F. Supp. 801 (E. D. Pa. 1944), where an attempt to challenge in court an administrative determination miscarried for procedural reasons.

License applications, so far as they relate to property, are mainly concerned with authorization of payments, or other dispositions of assets prohibited by the Executive Order.

By far the greatest part of all applications pertains to the first category, permission to make payments or other disposition of assets prohibited by the Executive Order. Before preparing such application, the lawyer should ascertain whether the proposed transaction is already covered by one of the general licenses. There have been issued approximately 90 such general licenses, some of which were later revoked, licensing generally various kinds of transactions and rendering it unnecessary in the situations covered thereby to apply for an individual license.

It is frequently impossible for the lawyer to advise his client whether the license application may be expected to be granted. There are, nevertheless, certain criteria which, if present, usually foretell a denial of the application. If it is conceivable that the transaction may tend to benefit the enemy, the application will, of course, be denied. But even if the proposed transaction appears to result in a benefit to the United States, the application will be denied if it involves even indirectly any communication with the enemy, or if any of the persons interested in the transaction is listed in the Proclaimed List of Certain Blocked Nationals, frequently known as the Black List.[7] There are a great many more considerations, connected with the conduct of the war and the sometimes changing purposes of our foreign economic policy, which may or may not affect the granting or denial of the application, and which are not expressed in any rule or regulation. The only way open to the practicing lawyer, in such cases, it appears, is the method of trial and error, which is somewhat eased by the fact that the filing and denial of an application does not involve any statutory fees or disbursements.

In case of litigation between parties where one of such parties, or both, are amenable to the restrictions of Executive Order affecting blocked assets, and in cases of attachments, the lawyer may face the problem whether first to procure a license and thereafter to start litigation, or to proceed with the litigation and apply for the license only after a judgment or attachment or other decision was reached in the judicial procedure. The latter method conforms to the Treasury Department's General Ruling No. 12, issued April 21, 1942,[8] which stated that it had no desire to limit the bringing of suits in courts within the United States provided that no greater interest was created by virtue of the attachment, judgment, etc., than the owner of the blocked account could have voluntarily conferred without a license. This method has been sanctioned by various court decisions. Thus, the lawyer may safely proceed with litigation and may postpone the filing of the license application until after the litigation has resulted in a decision.

[7] This list, prepared by the collaboration of several Departments of the Government, contains names of persons in neutral countries whose activities have brought them within the application of the President's Proclamation 2497 of July 17, 1941. DOCUMENTS, *supra* note 2, at 13-15. The latest edition of the list is Revision VIII, Sept. 13, 1944. Cumulative Supplements are issued periodically. Requests for printed copies should be addressed to the Federal Reserve Banks or the Department of State.

[8] DOCUMENTS, *supra* note 2, at 36.

THE ALIEN PROPERTY CUSTODIAN

Whereas the freezing of foreign funds appeared to be an appropriate device of economic defense for a nation formally at peace, the outbreak of war necessitated a stricter and tighter control of enemy assets. The Trading with the Enemy Act of October 6, 1917, was still on the statute books when Title III of the First War Powers Act of December 18, 1941, amending Section 5(b) of the Trading with the Enemy Act, confirmed the President's powers to vest foreign property in any agency or person as the President may designate, to be "held, used, administered, liquidated, sold, or otherwise dealt with in the interest and for the benefit of the United States."[9]

By Executive Order No. 9095 of March 11, 1942, the President established the Office of Alien Property Custodian. This was amended by Executive Order No. 9193 of July 6, 1942, defining in detail the competences of the Alien Property Custodian.[10] The Alien Property Custodian has been authorized and empowered by such Order to take such action as he deems necessary in the national interest with respect to six classes of alien property, including, but not limited to, the power to direct, manage, supervise, control or vest such property. The first class consists of business enterprises within the United States of enemy nationals, and of interests which enemy nationals have in business enterprises within the United States. In the second class are all business enterprises within the United States of foreign nationals, and interests which foreign nationals have in business enterprises within the United States, provided the Alien Property Custodian has determined, and certified to the Secretary of the Treasury in detail, what action is necessary in the national interest in regard to such businesses or interests therein. The third class includes any other property owned or controlled by enemies; monies, securities and other cash credits, however, only to the extent that they are necessary for the maintenance or safeguarding of other property subject to vesting, funds not necessary for such purpose remaining under the jurisdiction of the Treasury Department. The fourth and fifth class consist of patents, trademarks, copyrights, and ships and vessels respectively, held by any foreign country or national, while the sixth class comprises property under judicial supervision or partition proceedings, payable to an enemy country or national. When the Alien Property Custodian determines to exercise any power and authority thus conferred upon him to any property over which the Secretary of the Treasury is exercising any control and so notifies the Secretary of the Treasury in writing, the latter must release all control of such property, except as authorized or directed by the Alien Property Custodian.

Under the broad authority thus received, the Custodian has developed three main types of administrative procedure under which control of alien property is exercised by him.

The least stringent kind of supervision is the one exercised through the issuance of general orders. Such orders do not apply to specific items of property, but to

[9] 55 STAT. 841 (1941), 50 U. S. C. APP. (Supp. III, 1941-1943) §616.
[10] DOCUMENTS, *supra* note 2, at 10.

certain general classes of property. Persons who claim any kind of interest to such properties will be requested, by such orders, either to perform or to refrain from certain acts pertaining to such properties. To the first categories belong, for instance, such General Orders as requiring reports concerning patents and patent applications in which there is an enemy or foreign national interest;[11] requiring persons acting under judicial supervision or court proceedings to report property, involved in such supervision or proceedings, in which there is enemy or foreign national interest;[12] requiring service of process, upon any person within an enemy or enemy-occupied country, to be made upon the Alien Property Custodian;[13] requiring reports of unfiled patent applications and disclosures of enemy nationals;[14] requiring reports of royalties due and payable to the Alien Property Custodian under vested patent rights,[15] and others. Orders prohibiting acts are, e.g., the General Order prohibiting transactions by or on behalf of foreign nationals respecting patents or trademarks,[16] the Order prohibiting certain transactions respecting interests in works subject to copyrights,[17] and the Order prohibiting participation of employees of the Office of Alien Property Custodian in transactions affecting properties in which the Office has any interest.[18] In addition, there have been issued a few general orders requiring specific acts, as, for instance, termination of certain employment contracts of General Aniline and Film Corporation.

A second form of alien property supervision, in use mainly during the first few months of this war, when the nature of some enterprises could not be decided definitely at the moment, was exercised by the means of supervisory orders providing for the management and control of certain foreign-owned businesses and of certain American businesses where there was reason to believe that the management was disloyal to the national interest, without vesting of title in the Alien Property Custodian. Such supervisory control is still being employed in order to protect the interests of residents of enemy-occupied countries in business enterprises in the United States, as well as to protect the property of internees.

The procedure mostly used for property administration is the method of seizing the property and vesting title to it in the Alien Property Custodian as representative of the United States Government. The vesting of title takes place by virtue of the issuance of an order by the Alien Property Custodian directing such vesting. Nearly two thousand vesting orders have been issued and the value of the properties thus vested in the Alien Property Custodian is estimated to approximate $360,000,000, excluding the value of patents, trademarks, copyrights and ships.

If the property vested by the Alien Property Custodian belongs indisputably to

[11] 7 FED. REG. 4634 (1942), 1 C. C. H. War Law Serv. ¶7202.
[12] 7 FED. REG. 6199 (1942), 1 C. C. H. War Law Serv. ¶7205.
[13] 7 FED. REG. 6199 (1942), 1 C. C. H. War Law Serv. ¶7206.
[14] 7 FED. REG. 9476 (1942), 1 C. C. H. War Law Serv. ¶7212.
[15] 8 FED. REG. 1707 (1943), 1 C. C. H. War Law Serv. ¶7218 (and ¶7223 as to copyrights).
[16] 7 FED. REG. 9475 (1942), 1 C. C. H. War Law Serv. ¶7211.
[17] 7 FED. REG. 9476 (1942), 1 C. C. H. War Law Serv. ¶7213.
[18] 7 FED. REG. 8377 (1942), 1 C. C. H. War Law Serv. ¶7208.

an alien enemy nation or national, not many problems arise for the practicing lawyer at this time. The Alien Property Custodian may either seize the property forcibly by his own agents, or he may, if he so prefers, bring suit against any person or corporation holding such property. Such suit is of possessory nature, as it is based on seizure *in pais*.[19] The determination by the Alien Property Custodian that the property is held by an enemy is conclusive for such suit[20] and the question of enemy property *vel non* cannot be even inquired into therein.[21] If the Alien Property Custodian makes any such requirement for the delivery of property, a duly certified copy of the demand may be registered or recorded in any office for the registering or recording of conveyances, transfers, or assignments, and if so filed, shall impart the same notice and have the same force and effect as a duly executed conveyance, transfer, or assignment to the Alien Property Custodian.[22] In case the Alien Property Custodian requires the transfer to him of shares or stocks, or of beneficial interests in trusts, the corporation or the trustee is under a duty to cancel the shares or the beneficial interest, and in lieu thereof to issue certificates or similar instruments to the Alien Property.[23]

Under the Trading with the Enemy Act, as amended, the Alien Property Custodian is not only vested with all of the powers of a common-law trustee in respect of all property, except money, conveyed to him, but he has also the power to manage such property and to do any act or things in respect thereof, or make any disposition thereof, in like manner as though he were the absolute owner thereof.[24] The Alien Property Custodian has been thus left entirely free to decide whether to sell the properties transferred to him, or to manage the same himself. While it has been said that it is the policy of the Alien Property Custodian to transfer to private enterprise all vested properties, except patents and copyrights, as soon as appropriate measures can be taken to remove the influences of enemy control and as soon as satisfactory terms of sale can be arranged, it would appear that the Office has only sparingly liquidated its assets. The Act[25] requires that, in general, the property is

[19] Commercial Trust Co. v. Miller, 262 U. S. 51 (1923).

[20] Stoehr v. Wallace, 255 U. S. 239 (1921); Stern v. Newton, 180 Misc. 241, 39 N. Y. S. (2d) 593 (1943).

[21] Central Trust Co. v. Garvan, 254 U. S. 554 (1921).

[22] Sec. 7(c) of the Trading with the Enemy Act of 1917, 40 STAT. 416 (1917), 50 U. S. C. APP. (1940 ed.) §7(c). It should be noted, however, that a question has been raised whether this section, as well as other sections of the Act following Section 5(b) relating to the Alien Property Custodian, really apply to the Office of Alien Property Custodian which the President created under the World War II amendment to Section 5(b). The World War II agency, it is contended, is not necessarily *the* Alien Property Custodian of old Sections 6, 7 *et seq.* as one will appreciate by asking: Suppose the President had called the agency which he set up under new Section 5(b) by some other name, such as "Sequestrator of Enemy Property?" See Dulles, *The Vesting Powers of the Alien Property Custodian* (1943) 28 CORN. L. Q. 245; McNulty, *The Constitutionality of Alien Property Controls, infra,* this symposium, p. 135. This writer believes such doubts to be unjustified; cf. Wechsler, *Constitutionality of Alien Property Control: A Comment on the Problem of Remedies, infra* this symposium, at 149.

[23] Trading with the Enemy Act, *supra* note 22, §7c.

[24] *Id.* at §12. Again, attention is called to the caveat *supra* note 22 and to the fact that this power of the Alien Property Custodian can probably be supported without going outside Section 5(b) and EXEC. ORDER No. 9193 thereunder.

[25] *Ibid.* Also, this requirement can rest on new Section 5(b), EXEC. ORDER No. 9193 thereunder, and the Custodian's General Order No. 26 of May 29, 1943, 8 FED. REG. 7628 (1943), 1 C. C. H. War Law Serv. ¶7226.

to be sold only to American citizens, at public sale to the highest bidder, after public advertisement of time and place of the sale, and the Alien Property Custodian has the right to reject all bids and to resell the property at public sale or otherwise. General Order No. 26, of May 29, 1943,[26] specifies that prospective purchasers should submit sealed bids in writing which are to be opened in public, and awards will be made to the highest qualified bidders. If the Office should deem it necessary to reject bids, the reasons for such rejection shall be stated. Of course, property will not be sold to enemies, or to persons listed in the Proclaimed List of Certain Blocked Nationals (Black List). It is a misdemeanor, punishable with a fine up to $10,000 and imprisonment up to ten years, to purchase property from the Alien Property Custodian for an undisclosed principal, or for re-sale to a person not a citizen of the United States, or for the benefit of such a person.[27]

After the last war, the Alien Property Custodian tried to insure against the return of properties to the control of its former owners by contractual stipulations forbidding future transfers to enemy interests. In important cases, the sales contracts provided for voting trusts by which the trustees were instructed to guard against such transfers. However, such devices did not prove effective and were soon superseded by direct or indirect schemes conceived to eliminate their operation. Hence, it is the practice of the Alien Property Custodian to carefully select prospective buyers, not only with the view of avoiding the reverting of the properties to enemy control, but also to see to it lest monopolies or international cartels are favored or created, or other combinations inimical to our economy are assisted.

If the practicing lawyer is consulted in connection with the buying of property from the Alien Property Custodian, he should carefully analyze the background and economic integration of the interests of the prospective buyer. No general rule will assist him in the consideration of the various points which will establish the chances of his client to be permitted to buy the respective properties. In such instances, exact economic research and analysis of economic facts in each respective case will be of more determining importance than mere legal considerations. It may be added that in disposing of enemy minority interests in American enterprises, sales may, in appropriate cases, be transacted through public exchanges, just as well as in the disposition of real estate, the assistance of real estate brokers may be found desirable.

While thus the lawyer's work in connection with the liquidation of assets by the Alien Property Custodian tends more towards economic facts and considerations, questions of considerable legal interest are involved when non-enemy persons or corporations claim interests in properties vested by the Alien Property Custodian. Section 9(a) of the Act, as amended, provides that a person not an enemy nor ally of an enemy who claims any rights or interests in property conveyed to the Alien Property Custodian, or who has any claims against an enemy person whose property here has been seized by the Alien Property Custodian, may file with the Alien

[26] *Supra* note 25.

[27] Trading with the Enemy Act, *supra* note 22, Section 12.

Property Custodian a notice of his claim under oath. He may also make application for payment of his claim, and if the application is deemed justified, payment of the monies, or transfer of the assets seized, to such claimant may be ordered by the President or for him by the Custodian. In any event, however, whether or not such application has been made, the claimant may, if he has filed his notice of claim, institute an action at law or in equity in the appropriate Federal District Court to establish his right, title or interest which he may have in such money or other property.

Section 9(a) of the Act, as amended, was already in force before the outbreak of the present war, and so was Section 7(c) of the Act, as amended, which formed up to that time the only basis for vesting of property in the Alien Property Custodian before the enactment of the First War Powers Act of 1941. Hence, the right to judicial determination of the validity of the vesting of property vested under the authority of Section 7(c) of the Act, as amended, is guaranteed beyond question, at least if the vesting power is exercised under Section 7(c) as distinguished from 5(b), for reasons about to be explained. That remedy, of course, as the language of the statute clearly indicates, applies only to citizens, allies and neutrals whose property has been mistakenly seized and it does not apply to enemies or allies of enemies.[28] However, if a person or corporation, while itself being a citizen or resident of a neutral country, is doing business within enemy or enemy occupied countries, it becomes an "enemy" under Section 2(a) of the Act, and cannot claim the privileges of Section 9(a); and that is true even if such business within enemy or enemy-occupied countries was subsequently discontinued.[29]

Certain doubts have arisen in regard to the availability of the right to judicial determination as guaranteed by Section 9(a) of the Act, in connection with the enactment of the First War Powers Act of 1941. That Act[30] amended Section 5(b) of the Trading with the Enemy Act. Previous to this amendment, that section authorized the President to investigate, regulate, or prohibit certain transactions in time of war or during any other period of national emergency. The amendment extended such power and added that property or interest of any foreign country or national thereof shall vest, as directed by the President, in such agency or person as designated, and upon such terms and conditions as prescribed, by him.

The President's Executive Order 9193 of July 6, 1942,[31] outlining in detail the powers of the Alien Property Custodian is based upon this amendment. It has been contended by the Alien Property Custodian that all seizures of property made under the authority of Section 5(b) as amended are exempt from judicial supervision as provided in Section 9(a) of the Act, and such opinion has been shared by others.[32] It appears, however, that prevailing judicial opinion, at the time this

[28] United States v. Chemical Foundation, Inc., 272 U. S. 1 (1926).

[29] Swiss Insurance Co. v. Miller, 267 U. S. 42 (1926).

[30] *Supra* note 9.

[31] *Supra* note 10.

[32] Thus, Dulles, *op. cit. supra* note 22, suggests that instead of the statutory remedy provided in Section 9(a), a common law *in rem* proceeding in the nature of replevin is available. See also same

is being written, accords the right to judicial supervision also to such cases where the seizure occurred upon the authority of Section 5(b). As Judge Bondy said in the *Draeger* case[33] the First War Powers Act expressly purported to amend only the first sentence of Subdivision (b) of Section 5 of the Trading with the Enemy Act; if Congress had intended that the amendment should have the effect of an entirely new and separate enactment (by which it meant to exclude the applicability of Section 9(a)), Congress would have enacted it as it did the other titles of the Act, namely as a separate Act, and not as an amendment; as it is, it must be assumed that Congress intended that all provisions of the Trading with the Enemy Act shall be held applicable to this amendment; and it cannot be presumed, in the absence of compelling reasons, that Congress intended to withhold a judicial remedy from United States citizens which it grants to everyone but an enemy or an ally of enemy, where property has been seized as enemy property. To this reasoning may be added the further argument, *a minore ad majorem,* that if Congress held judicial supervision necessary and appropriate for seizures under the limited powers of the original Act, Congress probably believed such judicial supervision even more necessary under the much broader and sweeping powers bestowed upon the Custodian by the last amendment of Section 5(b). And while the power and authority of the Alien Property Custodian to initially seize property if he deems that necessary and justified should be strained to the limit, correlative judicial supervision appears indispensable.[34]

By Regulations of March 26, 1942,[35] as amended, the Custodian established administrative procedure for claims to property vested in the Custodian pursuant to Section 5(b) of the Act, as amended. Such claims are to be filed on a form issued by the Custodian (APC-1), in triplicate.[35a] The claims will be submitted by the Custodian to the Vested Property Claims Committee, which consists of three members designated by the Custodian. The Committee is empowered to hear claims respecting property vested under Section 5(b) of the Act, and the Committee has authority to formulate its rules and procedure. It has all powers necessary to carry out its functions, including the power to call witnesses and to compel production of books of accounts, records, contracts, memoranda, and other papers. The Custodian as well as the respective claimant is entitled to representation by counsel before the Committee. After a claim has been heard, the complete record, including a transcript of testimony, and the findings and recommendations of the Com-

author in 109 N. Y. L. J. No. 104. Cf. McNulty, *op. cit. supra* note 22. This writer does not agree with such a contention. Among other reasons, to substitute a common law action for the Sec. 9(a) remedy would mean that in many instances the claimant could not sue in the federal district court of his residence, as expressly authorized by Sec. 9(a)—an unnecessary inconvenience.

[33] Draeger Shipping Co. v. Crowley, 49 F. Supp. 215 (S. D. N. Y. 1943).

[34] This is not to say, however, that if the judicial remedy of Section 9(a) is not available, then none is available. See McNulty, *op. cit. supra* note 22, at 146.

[35] 7 FED. REG. 2290 (1942), 8 FED. REG. 16711 (1943), 1 C. C. H. War Law Serv. ¶7101, 8 CODE FED. REGS. (Cum. Supp. 1944) §501.1.

[35a] The time to file such claims has been extended to April 1, 1945, and a further extension may reasonably be expected.

mittee are to be transmitted to the Custodian. The Custodian will, after an examination of the record, issue his decision in the matter and will give appropriate notice to the claimant.

The practicing lawyer, faced with the problem of contesting a seizure of property effected by the Alien Property Custodian, should ascertain whether the Custodian based his action *explicite* on Section 5(b) or Section 7(c) of the Act. While some of the vesting orders state expressly that the vesting is decreed "pursuant to Section 5(b)," a great many orders fail to disclose upon what section of the Act they are based. If the seizure is based on Section 7(c), the remedy guaranteed by Section 9(a) exists without doubt. However, in view of the decision in the *Draeger* case,[36] there is a probability that the claimant may in any event, whether the seizure is based on Section 5(b) or Section 7(c), or if the seizure is based on no particular section, resort to the judicial proceeding outlined in Section 9(a) of the Act. Assuming that 9(a) procedure is available (and statements in this paragraph are based on that assumption), before starting proceedings, the claimant must file with the Custodian, as outlined above, a notice of his claim under oath. If he so desires, the claimant may also make an application for the restitution of the property to him. If he makes such application, he must wait sixty days from the filing of the application for an administrative decision. If the application is granted within such time, that ends the matter, except that any other person who alleges any right, title, or interest in or to such property, may institute a suit at law or in equity against the claimant to establish such right, title, or interest. If the application is not granted within sixty days after its filing, or if the claimant preferred not to make such application, but has duly filed the notice of his claim, then the claimant may institute a suit in equity either in the Supreme Court of the District of Columbia, or in the District Court of the United States for the District in which the claimant resides, or, in case of a corporation, where it has its principal place of business. The suit is directed either against the Alien Property Custodian or against the Treasurer of the United States, whoever holds possession of the property. If the suit has been instituted, the Custodian, or the Treasurer respectively, must retain the property in his custody until a final judgment or decree in favor of the claimant is fully satisfied, or until final judgment or decree has been entered against the claimant, or the suit has been otherwise terminated.

Inasmuch as the procedure before the Vested Property Claims Committee, established as above stated, is expressly limited to property vested in the Custodian pursuant to Section 5(b) of the Act, or where such procedure has been explicitly reserved in the vesting order, it would appear that such procedure is not available for claims in regard to property vested pursuant to Section 7(c) of the Act. This is the more anomalous as Section 5(b) does not contain any provisions for an administrative hearing of claims to property vested under Section 7(c), whereas Section 9(a), which, as contended by the Alien Property Custodian, does not apply

[36] *Supra* note 33.

to vestings under Section 5(b), but only to property vested under Section 7(c), expressly envisages an administrative proceeding to determine the validity of the claim. Hence, it would seem desirable that the said regulation be amended so that there remains no doubt whether the procedure provided therein may also be available for claims in regard to property vested under Section 7(c) of the Act. This is the more necessary as numerous vesting orders do not make it clear whether they are based on Section 5(b) or 7(c), and as the Custodian has contended that no judicial proceeding is open to any claimant before he has exhausted existing administrative remedies. This of course brings us right back to the question whether 9(a) proceedings are available to 5(b) vestings, for if they are, then, under the special provisions of 9(a), as was held in the *Draeger* case,[37] the claimant need not exhaust administrative remedies before resorting to 9(a) judicial proceedings. If, on the other hand, 9(a) proceedings are not available against 5(b) vestings, the usual rule requiring exhaustion of administrative remedies prevails, as has been recently held with respect to the Treasury's freezing controls.[38]

To be successful in either the administrative or judicial proceeding, the claimant has the burden of proof for his alleged rights, which proof must be established by a preponderance of evidence. If the seizure is based upon Section 7(c) of the Act, he must prove that he is neither an enemy nor an ally of an enemy, as defined in Section 2 of the Act, and that he has an interest, right, or title to the money or other property held by the Custodian or the Treasurer, or that a debt is owing to him from an enemy or ally of enemy whose property is held by the Custodian or Treasurer. If the seizure was based on Section 5(b), such showing alone is, of course, not satisfactory to warrant a return of the property to the claimant, as that would nullify the much larger powers to vest contained in Section 5(b). In order to entitle the claimant to a return of property vested under Section 5(b), it must be followed, in the way of reasonable statutory interpretation, that the claimant must prove, by a preponderance of evidence, that none of the sets of facts stated in Section 5(b) and in Executive Orders Nos. 8389, as amended, and 9193, entitling the Custodian to vest the property, are present—specifically, that he is not a "national" of a designated enemy or foreign country, as therein defined.[39]

Two identical bills (S. 1940 and H. R. 4840) have been introduced in the 78th Congress, Second Session, to amend the Trading with the Enemy Act in regard to the return of properties to non-enemies. Under these bills, American citizens whose properties have been wrongly seized by the Alien Property Custodian would have remedies similar to those at present provided for in Section 9(a) of the Act, as heretofore outlined. If the claimant is not an American citizen, but a foreign national (and, as obviously meant, though not clearly defined in the bills, not an

[37] *Ibid.*

[38] Hartmann v. Fed. Res. Bank of Philadelphia, 55 F. Supp. 801 (E. D. Pa. 1944); Carbone Corp. v. First Nat. Bank of Jersey City, 130 N. J. Eq. 111, 21 A. (2d) 366 (1941). For the general doctrine, see Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41, 51 (1938).

[39] Draeger Shipping Co. v. Crowley, 49 F. Supp. 215 (S. D. N. Y. 1943).

enemy national) then his remedy is a suit against the United States under the appropriate sections of the Judicial Code providing for just compensation for taking of property for public use.[40]

In addition to cases of law suits directed against the Alien Property Custodian, the practicing lawyer comes into contact with the Custodian's office whenever a person within enemy or enemy occupied country is a party to an action or other proceeding. Executive Order No. 9193 of July 6, 1942, authorized the Custodian to issue appropriate regulations governing the service of process or notice upon any person within enemy or enemy-occupied territory in connection with any court or administrative action or proceeding within the United States. By General Order No. 6 of August 3, 1942,[41] the Custodian directed that in such cases, the receipt by the Custodian of a copy of the process or notice sent to him by registered mail to his main office at Washington, D. C., shall be considered service of such process or notice upon the respective person if the Custodian, within sixty days from the receipt thereof, files with the respective court or administrative body a written acceptance of the service. The form of the notice or process to be served is determined by the rules and practice of the respective court or administrative body.

While the problems which face the practicing lawyer in connection with alien property, as outlined above, are at present still limited, the necessity of liquidating and disposing of the enemy property holdings or their proceeds after the war will add numerous new problems. What form this process will take is, of course, not yet foreseeable. A model for a solution which would avoid conceded mistakes made after the last war, yet remain within the limits of the traditional American policy to avoid confiscation, is contained in a bill introduced in Congress on November 15, 1943, by Representative Gearhart.[42] The bill, in the form of an amendment to the Trading with the Enemy Act, provides that all enemy properties seized by the Custodian, excluding properties of invaded countries and their nationals, are to be sold, the proceeds, together with proceeds of previous sales of enemy property and with certain enemy monies at present held under "freezing control" by the Treasury, to become the property of the United States, to be used to indemnify American nationals as Congress shall at a later time direct, for damages caused by measures of enemy governments and adjudicated by the courts of the United States. In order to assure full reimbursement to the former enemy owners, the bill declares it the policy of the United States that enemy governments are to be required, as a condition of the terms of the peace, to reimburse their nationals, in their respective domestic currencies, for the full value of their properties taken over by the United States. In order to guarantee and fortify the rights of the former owners to complete reimbursements by their governments, the courts of the United States are vested with jurisdiction to adjudicate

[40] 28 U. S. C. (1940 ed.) §41 (20) and §250 (28).

[41] 7 FED. REG. 6199 (1942), 1 C. C. H. War Law Serv. ¶7206, 8 CODE FED. REGS. (Cum. Supp. 1944) §503.6.

[42] H. R. 3672, 78th Cong., 1st Sess. See Gearhart, *Post-War Prospects for Treatment of Enemy Property, infra,* this symposium, p. 183.

the claims of such former owners, and their governments will have to pay the judgments entered by our courts.

An equally strong assurance of full compensation to former owners is not contained in two identical bills (S. 2038 and H. R. 5118) introduced on June 23, 1944, which, while likewise conveying absolute ownership of enemy property to the United States, provide merely that no trade agreement shall be concluded with any enemy nation unless it agrees to compensate its nationals for properties taken over by the United States. In addition, such bills provide that the United States shall assume liability for compensation of all claims of United States citizens for damage suffered on account of measures of enemy governments, and that the Reconstruction Finance Corporation is authorized to make loans to any claimant in the amount up to seventy-five percent of his claim.

The solution proposed in Representative Gearhart's bill, H. R. 3672, entrusts American lawyers with the noble and honorable task not only of securing just indemnification for war losses to American citizens out of available enemy properties in our hand, but simultaneously to assure to the former enemy owners through our courts full compensation in their own currency by their own governments, and thus to adhere to the established American policy of non-confiscation of private property. That there is no confiscation involved if full compensation is being paid for property taken for public use, is clear beyond argument; even American citizens fully protected by our Constitution have frequently to submit to such process. If, on the other hand, we would return enemy property unconditionally to the aggressor nations and would permit American claims for damage to American property by such aggressor nations remain to be unsecured and unpaid, as they undoubtedly would on account of inability of such nations to secure the necessary foreign exchange, we would deal a deadly blow to the protection of American property rights abroad. For, if we do not find the strength or ability now to compel indemnity for violation of American property rights, after a long and costly war, we would give the green light to all foreign forces intent on preying on American property rights and investments abroad. Should the American lawyers be called to assist in averting such results, one feels assured that they will be well prepared to assume such task, and to perform it to their credit.

THE WORK OF THE ALIEN PROPERTY CUSTODIAN

PAUL V. MYRON*

The control, seizure and administration of enemy property is a right inherent in every wartime government. The framers of our Constitution apparently provided for the exercise of this right by Congress in Article 1, Section 8, Clause 11, which states that Congress shall have the power to "declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water." Article 1, Section 8, Clause 18, further grants to Congress the auxiliary power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." Congress is thereby vested with the power not only to make rules concerning captures on land and water, but also authority to provide all appropriate means which are conducive or adapted to the accomplishment of that end, and which, in the sole judgment of Congress will most advantageously effect the purposes sought to be accomplished. Under this Constitutional grant of power, Congress may enact such legislation as is necessary to deal adequately with property located in the United States in which enemies or their adherents have an interest.

The Trading with the Enemy Act passed shortly after the beginning of the first World War is a concrete example of the exercise of this right by Congress. This act delegates certain powers to the President and to the Alien Property Custodian, authorizing the seizure and control of all property located in the United States owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, a person in an enemy country or enemy-occupied territory or a person proclaimed by the President to be an enemy. These powers were exercised by our Government during the last World War so as to prevent any possible use of this property by the enemy either to further their own war aims or to impede the progress of our own effort to win the war. Enemy property was seized and converted to the use and benefit of the United States and the destruction or dereliction of a great amount of abandoned property which would have resulted in injury to individual nationals without benefit to the United States was prevented by our Government acting under its war powers.

Prior to the Japanese attack at Pearl Harbor, the United States Government was exercising a peacetime emergency control over transactions affecting property owned by the nationals of the Axis and invaded countries pursuant to Section 5(b) of the

* A.B., 1926, Boston College; LL.B., 1929, Boston University Law School. Member of the Massachusetts Bar; member of the Federal Bar; Special Assistant to the Attorney General, 1935 to 1941. Chief, Estates and Trusts Section, Office of Alien Property Custodian, 1942 and 1943. Assistant to the Alien Property Custodian, 1944 and 1945. Contributor to legal periodicals.

Trading with the Enemy Act. This plan of foreign property control, commonly known as "Freezing Control," was designed first to conserve that property against acts of the Axis powers, and secondly, to prevent transactions in foreign property which were prejudicial to the best interests of the United States, then a neutral nation. The program, administered by the Treasury Department, and limited to immobilizing or freezing the property of foreign countries or nationals thereof, was initiated in April, 1940, when Norway and Denmark were invaded. All transactions in foreign exchange, credit, and other property involving the nationals of these two countries were subjected to regulation by license. As other nations came under the domination of Germany, Italy and Japan, control was extended to the property interests of such nations and their nationals, and finally in June of 1941 to Germany, Italy and Japan, and their nationals.

This method of control was patently inadequate to meet all requirements of a wartime government. No agency was authorized to take title to or possession of enemy property, or to exercise the complementary function of mobilizing foreign-owned productive resources in our war effort. Upon our declaration of war against Germany, Italy and Japan, these necessary wartime controls contained in the Trading with the Enemy Act as amended, became operative and shortly thereafter were further extended under the provisions of the First War Powers Act of 1941. It was pursuant to the provisions of this legislation that the present Office of Alien Property Custodian was created and the Custodian empowered to administer foreign-owned property in accordance with wartime requirements.

Sections 301 and 302 of Title III of the First War Powers Act of 1941, which amended the first sentence of subdivision (b) of Section 5 of the Trading with the Enemy Act of 1917, granted to the President operating through such agency as he might choose, the power to investigate, nullify and regulate transactions involving property in which foreign countries or nationals thereof have an interest and to vest any property or interest of any foreign country or national thereof in any agency or person whom the President may designate; such property or interest to be held, used, administered, liquidated, sold or otherwise dealt with in the interest of and for the benefit of the United States.

The President on March 11, 1942, by Executive Order No. 9095, created the Office of Alien Property Custodian and delegated to the Custodian all the powers which had been granted to him by Sections 3(a) and 5(b) of the Trading with the Enemy Act, as amended. This Executive Order in general terms authorized the Custodian to deal comprehensively with the problems that surround foreign property and its ownership or control. On July 6, 1942, the President issued Executive Order No. 9193 which amended Executive Order No. 9095. Executive Order No. 9193 enumerates certain specific policies with respect to the treatment of property determined to be the property of persons within countries with which the United States was at war and the manner in which property of persons within countries occupied by the enemy shall be dealt with. The powers of supervision, control and

vesting of these two types of foreign-owned property are divided between the Alien Property Custodian and the Secretary of the Treasury. While defining in detail the specific powers and duties delegated to each agency the order provides that no person may challenge the validity of any act of either the Alien Property Custodian or Secretary of the Treasury on the grounds that the authority for such act was specifically delegated to the Alien Property Custodian or the Secretary of the Treasury or vice versa.

Under the provisions of Executive Order No. 9193, the Custodian is authorized to take such action as he deems necessary in the national interest, including but not limited to the power to direct, manage, supervise, control or vest the following classes of property:

A. Property in which foreign nationals[1] have an interest:

1. Business enterprises and interests therein when the Custodian certifies to the Secretary of the Treasury that it is in the national interest for him to take jurisdiction over such property;
2. Patents, patent applications, copyrights, copyright applications, trademarks, or trademark applications or rights;
3. Ships, vessels, or interests therein.

B. Property in which enemy nationals have an interest:[2]

1. Business enterprises and interests therein;
2. Any property in the process of judicial administration;
3. Any other property, not including cash, bank deposits, securities, etc.[3]

The Custodian's first task was to identify foreign property interests located in the United States, and to determine the beneficial ownership of such property.[4]

The prewar census of foreign-owned property taken by the Treasury Department was an important source of information to the Custodian's office. These reports supplemented by further reports received in compliance with the General Orders of the Custodian provided the major body of information necessary to deal with the apparent widespread efforts of the enemy to conceal the true ownership

[1] Foreign nationals include residents of countries designated in Executive Order No. 8389, as amended.

[2] Enemy nationals include not only residents of countries with which the United States is at war but also the following: (a) citizens of enemy countries who reside in enemy-occupied countries; (b) persons (not residents of enemy countries) who have been acting for an enemy country. Moreover, wherever our national interest dictates that such action be taken, the Custodian may require that certain persons and enterprises be treated as nationals of enemy countries. In view of this broad definition the Custodian has treated as enemies certain persons and enterprises that have appeared on the Proclaimed List of Blocked Nationals; residents of enemy-occupied countries who were suspected of enemy affiliations; interned aliens when they are "determined" to have been acting for enemies.

[3] Where the Custodian determines that cash, bank deposits or securities are necessary for the maintenance of other property belonging to the same designated enemy national, he has the authority to vest the cash, etc.

[4] The powers to investigate, like the powers to control foreign interests in property, were delegated by the President through Executive Order 9095, as amended. In accordance with the provisions of Section 5(b) of the Trading with the Enemy Act, as amended, the Custodian was authorized to require the production of books of account, records, contracts, leases, memoranda, or other papers. Moreover, the Custodian was authorized to require the seizure of all pertinent data whenever it was necessary to do so in the national interest.

of property through elaborate systems of agreements, loans, options and cloaking devices, such as holding companies incorporated in neutral countries.

Applications for licenses to engage in transactions filed with the Foreign Funds Control Division of the Treasury Department, investigations by the Federal Bureau of Investigation and the Treasury Department, and reports, files and data collected by various units of the Department of State, the Department of Justice, the Patent Office, the Office of Strategic Services, Foreign Economic Administration, the War and Navy Departments, Securities and Exchange Commission and other government departments and agencies were further sources of information which have been utilized by the Custodian in securing precise descriptions of properties and the identity and nationality of the true owners.

The primary objective of the Custodian has been to insure the effective utilization in our wartime economic system of all foreign-owned properties which come under his jurisdiction. In determining the priority with which foreign properties should be investigated precedence was given to those properties which were of value to the war effort and in which it was believed that enemy influences were present. Immediate investigations were conducted and appropriate action taken as soon as circumstances warranted.

TYPES OF CONTROL EXERCISED BY THE CUSTODIAN

Vesting

As a general rule, the Custodian has followed a policy of vesting the property or interests of persons in countries with which the United States is at war within the limitations of Executive Order No. 9193. In taking title to such property the Custodian is in a position to exercise complete control of such property or interest for the use and benefit of the United States since, by vesting, all rights of the former enemy owners to such property are vitiated. The Custodian's power to vest, however, is not limited to the property of persons within enemy countries. The Custodian is specifically authorized to vest the property and interests of persons in occupied territory and of persons who are found by the Custodian to be acting as cloaks for enemies when he determines such act is in the national interest. The property interests of persons in enemy countries and enemy-occupied territory in patents, copyrights and trademarks have usually been vested.

Supervision

Under the authority delegated to him by the President, the Alien Property Custodian may exercise his control by supervising, rather than by vesting, certain classes of property including business enterprises belonging to nationals of enemy and of other foreign countries. As a general policy he has chosen to supervise rather than vest business enterprises in which enemy nationals have only a minority interest, but have indirectly obtained control. He has in this way been able to eliminate enemy domination of the enterprise and substitute American management, thereby increasing the efficiency and productive efforts of these enterprises.

It has been found to be in the national interest to take supervisory control of the property of certain internees in order to prevent the dereliction and destruction of their property. So also property of United States citizens residing in enemy countries or occupied territory which is important to the war effort is supervised or in some cases vested in order that it might be put to the fullest possible use, or because if not supervised or vested it would become derelict.

The mechanics of vesting or exercising supervision over property is somewhat the same. In each case an appropriate order is issued by the Custodian. Originally supervisory orders were issued supplementary to vesting orders, but this practice was abandoned in the latter part of 1942. When such action is deemed advisable supervisory clauses are now incorporated in vesting orders. This practice enables the Custodian to acquire control of vested property, particularly business enterprises, more quickly than by virtue of the vesting action alone since the procedure of transferring title and changing management is frequently complicated and time consuming. The issuance of a supervisory order also permits the Custodian to extend control to subsidiaries of business enterprises when he has vested an interest in the parent concern.

The issuance of a supervisory order does not in any way affect title to the property, but confers upon the Custodian only the right to control its use and operation. Hence, when the necessary objectives have been accomplished and supervision is no longer required, control may be released by a revocation of the supervisory order. This simple procedure permits the original owners to resume the operation and management of the business immediately.

BUSINESS ENTERPRISES

The authority to deal with foreign-owned corporations, partnerships and other types of business enterprises is contained in the provisions of Section 2(a) and (b) of Executive Order No. 9193.

The Alien Property Custodian either vests the enemy interests in the enterprise (interest vesting) or vests the assets of the enterprise (asset vesting).

Since the primary concern is the elimination of any actual or potential enemy control of a business, the Custodian, in a great majority of cases, has left untouched the small minority stock interests held by nationals of an enemy country which could not possibly influence the control and operation of a company. (The stock and dividends accruing thereon are subject to the Freezing Control of the Treasury Department.)

In non-corporate business enterprises the nature and extent of enemy interests are important factors in determining what action the Custodian will take. When all partners in a partnership are enemy nationals, it is the usual practice to vest both the assets of the enterprise and the interests of the partners. When only some of the partners are enemy nationals the Custodian takes all right, title and interest of the enemies in the partnership. These "Interest Vestings" are also made with re-

spect to sole proprietorship and non-profit organizations, such as the German-American Bund and American branches of foreign enemy dominated business enterprises.

Approximately seventy percent of the business enterprises vested have been corporations. In order to acquire the ownership and control of this type of property, the Alien Property Custodian has issued over five hundred vesting orders. These vesting orders do not represent the actual number of business enterprises vested. In some instances more than one vesting order is issued to cover separate enemy interests in the same firm. On the other hand one order may cover many subsidiaries and affiliates of the principal enterprise.

About one-third of the Custodian's net equity in all business enterprises vested represented German interests in chemical manufacturing enterprises. The large enemy interests in the banking and insurance fields have been predominantly Japanese and Italian. The remainder of the vested companies engaging in trade or commerce, various types of financial operations, insurance, real estate, transportation, agriculture and patent holdings were for the most part German and Japanese owned or controlled.

The Operation of Business Enterprises

When the Custodian assumes control of an enterprise, he takes immediate steps to assure the continuous operation or orderly liquidation of the business. If he finds that the enemy control has penetrated the management, he restaffs the enterprise with qualified personnel. When the existing management is reliable and there is no evidence of enemy sympathies or affiliations that might restrict operations, the Custodian usually exercises his control as a stockholder through the normal corporate processes such as participation in the election of an appropriate board of directors.

Directors designated by the Custodian have the same duties and responsibilities as the directors of any other corporation. Due to the nature of their appointment, however, they may consult with the Custodian's office regarding the policies of the Custodian with respect to the business. In some cases if the activities of such an enterprise are vital to the war effort, field representatives of the Custodian's office are placed in positions in the enterprise so that they may inspect and examine into its activities and make reports thereof to the Custodian.

There are several factors which influence the decision of the Custodian to maintain and operate as going concerns certain business enterprises where vesting has occurred. The necessity and importance of an enterprise to the war effort is always a controlling factor. In some instances the decision of the Custodian may be based on the fact that an enterprise is performing useful services, operates profitably and is not dependent for continued existence on affiliations with enemy nationals. If the Custodian vests only minority interests in a concern, the enterprise will continue to operate as a going concern unless the majority shareholders agree to liquidate.

Partnerships and proprietorships which have been vested by the Custodian are usually operated by the appointment of a manager who assumes complete control of the firm and is under the supervision of the Alien Property Custodian.

The success of the Custodian's policy with respect to the operation of vested enterprises is attested by the valuable contributions which these companies have made to the war effort.

Disposition of Business Enterprises

The Alien Property Custodian does not retain control of business enterprises which he has vested for a period any longer than is absolutely necessary in the best interest of the United States. It is his policy to transfer to private hands as speedily as possibly the properties which he has vested, thereby relieving the government of the burden of administering these properties in competition with American private business.

When it is decided to dispose of a going concern the Custodian arranges for the sale of the stock, or the entire assets of the firm, whichever is appropriate under the particular circumstances in each case. Thus, when the Custodian owns less than one hundred percent of the common stock of the corporation, stock sales will, as a rule, be the usual method of disposition.

On the other hand a sale of the assets in bulk legally constitutes a liquidation of a going concern. Economically, however, such a sale leaves the establishment a going concern just as much as the sale of stock. It is only when the assets are sold piecemeal that the enterprise is terminated as an economic unit.

If the assets of an enterprise have been vested, such as the assets of proprietorships, partnerships, or domestic branches of foreign companies, the Custodian takes possession of the assets and arranges for their sale. The assets may be sold as a unit to a single purchaser, in separate lots to several purchasers, or in some cases part of the assets may be disposed of by a series of sales during limited operation of the business.

When a vested enterprise is operating under a name which conveys to the American public some close association with a product manufactured abroad, the Custodian may leave the productive entity undisturbed by selling the assets in bulk, thereafter eliminating the corporate name from the enterprise by dissolution. The efforts required to sell the stock and the difficulties to be met in disposing of the assets in bulk and, of course, the net return which may be obtained from each method of sale are important considerations in determining the method of disposition.

The Custodian may determine to dispose of a vested enterprise by liquidation. His decision to liquidate is usually the result of his determination that such business has no place in our wartime economy, or that it is so dependent upon foreign sources for materials that it cannot continue to operate because of the impossibility of securing materials during wartime. Insolvent companies and enterprises which are found to be unprofitable, are liquidated. Such business enterprises as banks and insurance

companies, trading companies, shipping agencies, real estate holding companies and distributors of enemy manufactured articles are liquidated.

In the liquidation of a corporation the capital stock of which has been vested, the procedure is the same as that which would normally be employed by private owners. The acting, or newly elected directors and officers, proceed with the liquidation under the direction of the Custodian.

The involved financial activities of some of the vested enterprises have presented many difficult problems in the liquidation process. Many of the enterprises prior to the date of vesting have had extensive dealings with banks which are also being liquidated, and these banks in turn have had transactions with their home offices in foreign countries and with other branches throughout the world.

The liquidation program is now substantially completed. Some property, such as articles manufactured for export, which cannot be used by American firms, and securities owned by vested corporations have not been sold. Preparations for the sale of such securities are under consideration at the present time.

INDUSTRIAL PROPERTY

Section 2(d) of Executive Order No. 9193, delegates to the Alien Property Custodian the authority to deal with foreign patents, trademarks and copyrights.[5]

Trademarks

An examination of the records of the United States Patent Office at the beginning of the war disclosed approximately 7,000 trademarks registered in the names of nationals of enemy or enemy-occupied countries. General Order No. 16 issued by the Custodian which requires persons having information, or reason to believe that foreign nationals have an interest in trademarks to file a report with the Custodian, served as a further means of obtaining information about foreign-owned trademarks. These reports were checked against assignment records of the Patent Office, Treasury Department and patent reports received by the Custodian. This check disclosed that only a small proportion of all the foreign trademarks registered in the United States have actually been used here. A substantial number of the more important trademarks of enemy origin were being used by business enterprises formerly under enemy influence. In some instances a firm owned the trademark outright; in others, the firm used the trademark by oral or written agreement with foreign owners. It was found that American interests in enemy-owned trademarks were often the result of bona fide prewar agreements.

In order to protect the interests of legitimate users of trademarks and of the public generally, the Custodian adopted a policy of selective vesting of trademarks including the good will of the business which they represent. He vests enemy-owned trademarks and trademark rights which are being used pursuant to prewar agreements by American enterprises engaged in the manufacture or sale of Amer-

[5] The subject of Patents is treated in a separate article in this symposium: Sargeant and Creamer, *Enemy Patents, infra* p. 92.

ican made products. The royalty payments due under prewar agreements are collected by the Custodian.

If any residual rights in trademarks are owned by enemy nationals under contracts with a vested business enterprise, such rights are vested to safeguard the business enterprise or the prospective American purchaser of the enterprise against any claim for the use of the trademark which the enemy may assert after the end of the war. In the absence of unusual circumstances trademarks owned by nationals of enemy-occupied countries are not vested.

The Custodian has determined it to be desirable to continue the use of certain enemy-owned trademarks, which represent good will and acceptance by the consumer, because the trademark facilitates the sale and disposition of the product.

Disposition of Trademarks

Trademarks, attaching to vested enterprises which are sold as going concerns, are included in the sale of such enterprises. If the trademarks are associated with products manufactured under vested patents licensed by the Custodian, arrangements are made for the use of the trademarks by the patent licensees. The Custodian does not consent to the use of vested trademarks by American firms when the marks have merely been registered by the foreign owners but never used in this country, or where American manufacturers find it impossible to duplicate a trademarked product which was formerly imported.

Copyrights

Many of the copyrights owned by nationals of enemy or enemy-occupied countries cover works of little or no value to the war program. General Order No. 14 requires persons having interests in foreign works subject to copyright to file a report with the Office of Alien Property Custodian. Report forms for this purpose were prepared and sent to approximately eighteen hundred individuals and companies including music licensing societies, radio broadcasting firms, music publishers, manufacturers of records and electrical transcriptions, book publishers, theatrical producers, motion picture companies and other agents dealing in copyrighted material.

The policy of selective vesting is followed with respect to copyrights. Generally speaking, copyrights are vested either: (1) to permit an American firm to reproduce a work of some national interest or importance which originally was produced by a foreign national; and (2) to collect royalties payable by an American licensee to an enemy national.

The original program of the Custodian did not contemplate extensive vesting of copyrights of nationals of enemy-occupied countries. As a practical matter, however, it was found that without title to a copyright publishers felt too uncertain of their rights and would not undertake the work of republishing. Failure to publish important scientific works deprived the public of valuable knowledge and techniques and the copyright holder of royalties which he would otherwise obtain. For these

reasons there has been a change of policy and copyrights of nationals of enemy-occupied territory are now vested by the Custodian.

If, as a protective measure, the Custodian vests a copyright of a scientific book, he issues a nonexclusive license to the publisher and, since scientific books are expensive to publish and have a relatively restricted market, the Custodian usually agrees not to grant additional licenses on the specified work for a period of six months.

One of the most important books republished under a license issued by the Custodian is *Beilstein's Handbook of Organic Chemistry*. Prior to the war a complete set of the work cost $2,000. It is now available at one-fifth of the prewar price.

Non-exclusive licenses to reproduce articles, extracts, maps, charts, etc., have been granted royalty-free, upon request, to public research organizations, agencies of the Federal Government and educational institutions. If such licenses are issued to private persons and firms, royalties are payable at the usual trade rate.

As of June 30, 1944, the Custodian had issued 158 vesting orders, vesting approximately 120,500 copyrights. Of this total more than 118,000 were copyrights of musical compositions.

MISCELLANEOUS REAL AND PERSONAL PROPERTY

Section 2(c) of Executive Order No. 9193, authorizes the Custodian to deal with the real and personal property of foreign nationals.

Information concerning enemy owners of real and personal property is obtained by the Custodian from several sources: Treasury Department reports, APC-3 reports covering property in litigation, information from attorneys or agents who had handled the real property interests of foreigners, information obtained from an examination of the books of foreign-owned business enterprises and reports of internees and persons repatriated to enemy countries. The cost of vesting small parcels of real esate, in many instances disproportionate to the value of the property, and the great difficulty encountered in obtaining competitive bids for the sale of small and undivided interests in real estate are considered by the Custodian before vesting real estate.

As a general policy, the Custodian vests all mortgages of real property belonging to enemy nationals unless the balance due on the mortgage is too small to justify the expense of administering this particular property. Real property belonging to nationals of enemy-occupied countries is not vested.

Disposition

In order to avoid the administrative burden of managing these properties the Custodian obtains appraisals and sells, as quickly as possible, the real estate which he vests. Real estate is usually sold at public sale to the highest bidder. The Custodian, however, has the discretion to accept the highest bid, or reject all bids and either advertise again for new bids or sell at private sale.

ENEMY PROPERTY IN LITIGATION

Section 5 of Executive Order No. 9193 authorizes the Custodian to make rules and regulations governing the service of process or notice on persons in enemy countries and enemy-occupied territory in connection with any court or administrative action or proceeding within the United States, and to provide adequate representation in such actions and proceedings for those foreign nationals who are unable to be present and assert or defend their rights under the Constitution and laws of the United States and the respective states, territories and possessions.

In order to effectuate these duties, the Custodian has issued General Orders Nos. 5, 6 and 20. General Order No. 5 requires all persons acting under judicial supervision to file a report of any such case with the Custodian. A special form identified as APC-3 was adopted for use in making reports of property of this nature. The information submitted on this form makes it possible for the Custodian to determine whether to accept service of process or notice on behalf of a foreign national, designate an attorney to appear and represent the national, and finally whether to vest or to consent to distribution of the property or interest into a blocked account under the rules, orders and regulations of the Secretary of the Treasury, pursuant to Executive Order No. 8389.

General Order No. 6 permits service of process or notice upon persons in enemy countries, or enemy-occupied territory to be made by sending by registered mail to the Alien Property Custodian, Washington, D. C., a copy of the notice or process. The validity of this type of service is made dependent upon the Alien Property Custodian's written acceptance within sixty days from receipt thereof. This substituted service places the property of the foreign national before the court, so that in actions *in rem* or *quasi in rem* the court may hear and determine the rights and interests of the parties and enter judgments and decrees in accordance with due process.

When the Custodian has accepted service of process or notice on behalf of an absentee national, he assumes the added responsibility of providing that essential element of due process, namely, that the interested party have an opportunity to be heard before judgment is pronounced against him. An attorney selected by the Custodian is designated to file in the pending action or proceeding his formal appearance on behalf of the foreign national and to represent the absentee and protect his interest in the same manner that a private attorney would protect the interest of his client. The attorney designated is subject at all times to the control and supervision of the Alien Property Custodian. The action taken by the Custodian at the termination of the proceedings is dependent on whether the nationals of an enemy country or enemy-occupied territory are determined by the court to have an interest in property.

The distribution of such property or interest is subject to General Order No. 20, which requires the consent of the Alien Property Custodian to the payment or

transfer of property to, or for the benefit of a person in an enemy country or enemy-occupied territory.

It is the usual policy of the Custodian to vest all interests under judicial supervision which are determined to be payable or deliverable to or claimed by, any person within a country with which the United States is at war, or a national of such countries who is within enemy-occupied territory. If, however, a person in enemy-occupied territory (other than the national of an enemy country) obtains or is determined by a court to have an interest in property, such property or interest is subject to the provisions of Executive Order No. 8389, as amended, and licenses issued pursuant thereto and is required to be deposited in a blocked account in a domestic bank or with a public office or agency designated by a court having jurisdiction of the property in the following manner:

1. In the name of the national.
2. In trust for the national.
3. In any other designation clearly showing the interest of the national.

Thus, with respect to property under judicial supervision, the Custodian acquires title to and obtains immediate possession of the property and interest of those persons within countries with which we are at war (or nationals of such countries who are within occupied territory) and provides for the protection and preservation of property and interests of those persons within enemy-occupied territory who have been brought under the domination of the enemy by reason of the occupation of their countries by the enemy.

The general effect of these activities has been to remove from the potential use and control by the enemy, millions of dollars worth of property and has made possible the distribution of hundreds of millions of dollars worth of real and personal property to American citizens who would otherwise be deprived of the use and benefit thereof, until after cessation of hostilities. The marketability of real estate in this country, in which foreign nationals have an interest, has been amply protected, and foreclosure or partition proceedings have been consummated.

SALES PROCEDURE

Unless it is otherwise determined to be in the national interest, vested property is sold at public sale after public advertisement.

General Order No. 26, issued by the Custodian June 9, 1943, governs the procedure for selling vested property. Under the provisions of this order, property valued at more than ten thousand dollars must be sold at public sale, unless it comes within certain exceptions which permit special sales. Property valued at less than ten thousand dollars may be sold at private sale and at a time and place of the most favorable demand, and upon such terms as may be necessary to secure the best market. As a matter of practice, however, all property regardless of value is sold at public sale, unless a "Special Sale" is determined to be in the best interest of the United States.

"Special Sales" include sales to another agency of the Federal Government, or at the request of another agency of the Federal Government to a private concern; sales of perishable property; sales of securities and commodities upon public exchanges; and sales of real estate. These "Special Sales" are made under the same flexible rules which govern the sale of property valued at less than ten thousand dollars.

When the sale is public, the property is advertised for sale and bids solicited. Sealed bids received by the Custodian are opened in public and awards are made to the highest qualified bidder. If the highest bid is not acceptable, the Custodian may reject all bids and make new arrangements for obtaining a more adequate bid.

In order to make certain that former enemy control and restrictive practices may not be renewed, the Custodian before selling makes sure that the contemplated sale of the property will constitute a definite and permanent transfer to owners who have no direct or indirect affiliations with the enemy and that the property will not be used by the new owners to stifle competition. If there is any evidence that the highest bidder intends to dominate the market for a specific commodity through the purchase of a vested enterprise, or to protect some outstanding investment by eliminating potential competition, the Custodian may ignore his bid and choose a more acceptable lower bidder who meets with his approval, or he may reject all bids and solicit new bidders.

Section 12 of the Trading with the Enemy Act provides in part:

". . . Any person purchasing property from the alien property custodian for an undisclosed principal, or for re-sale to a person not a citizen of the United States, or for the benefit of a person not a citizen of the United States, shall be guilty of a misdemeanor, and upon conviction, shall be subject to a fine of not more than $10,000, or imprisonment for not more than ten years, or both, and the property shall be forfeited to the United States. It shall be the duty of every corporation incorporated within the United States and every unincorporated association, or company, or trustee, or trustees within the United States issuing shares or certificates representing beneficial interests to transfer such shares or certificates upon its, his, or their books into the name of the alien property custodian upon demand, accompanied by the presentation of the certificates which represent such shares of beneficial interests. The alien property custodian shall forthwith deposit in the Treasury of the United States, as hereinbefore provided, the proceeds of any such property or rights so sold by him."

CLAIMS AGAINST THE CUSTODIAN

The post-war policy with respect to the disposition of vested property, or the proceeds from the sale of such property will be determined by the Congress of the United States at the conclusion of the war. At this time it is impossible to forecast if, when, and how Congress will provide for the return of vested property. Likewise the adjustment of war claims, including claims for damage to property of American citizens by enemy action, is a matter which must await the termination of hostilities.

There are, however, two major types of claims with which the Alien Property Custodian is immediately concerned.

1. Claims for the return of property alleged to have been erroneously vested.
2. Claims asserted against vested property for the settlement of debts incurred by the former owner.

The first classification has reference to property which is alleged to have been seized by the Custodian as a result of erroneous determinations either with respect to ownership of the property, or the enemy status of the owners. The second classification pertains to debt claims or creditor's claims and include claims for wages, repairs or alterations to property, rents, security liens and, in general, claims of any nature against the property which arose out of obligations undertaken by the former owners prior to the date of vesting.

If the Custodian has vested only the stock of a corporation and the corporation continues to exist as a legal entity, the Custodian is not the proper party to be sued for debts of the corporation. Such claims are filed against the corporation and the successful claimants are paid by the corporation in the ordinary course of business. When, however, the assets of a corporation are vested, claims thereafter may be filed with the Custodian. These claims will be considered and the Custodian will take such action as the applicable statutes, rules and regulations permit.

In order to provide for American citizens and non-enemy nationals a right of relief from, or against the Custodian, because of vesting, supervisory or other order of the Alien Property Custodian there has been established within the agency a committee known as the Vested Property Claims Committee. The Custodian has delegated to this committee the authority to hear, consider and decide certain limited types of claims. This committee composed of three members is entirely divorced from all other activities of the office. Notice of claim with a request for a hearing may be filed on appropriate forms provided by the Custodian within one year after the alleged wrongful action, or within such further time as may be allowed by the Alien Property Custodian.

The regulations governing the hearings before this committee are similar to those of such agencies as the Federal Trade Commission, Securities and Exchange Commission and the National Labor Relations Board. Notice of hearings is published in the Federal Register and the proceedings are open to the public. The committee has the power to subpoena witnesses, to compel the production of documents for use as evidence, to administer oaths to witnesses and to apply the fundamental rules of practice, procedure and evidence. The claimants have a right to be represented by counsel. The General Counsel of the Office of Alien Property Custodian appears on behalf of the agency. The committee keeps a record of every hearing before it, including a transcript of any examination of witnesses and this record is open to public inspection.

The determination of the committee is final unless the Custodian, or Deputy

Custodian, in his discretion, undertakes a personal review of the case. Requests for a review by the Custodian, or Deputy Custodian may be filed by any party in interest within twenty days after notice of the determination of the committee. If the Custodian, or Deputy Custodian decides to review a case, all parties will be afforded an opportunity to submit briefs and with the permission of the Custodian, or Deputy Custodian may orally argue the case.

The Custodian, or Deputy Custodian may, as a result of his personal review, adopt, modify, reverse, remand or otherwise dispose of the committee's determination. All interested parties will be notified of his action. When a claim is allowed, the property involved is returned to the rightful owner through the issuance by the Custodian of a divesting order.

The General Counsel of the Office of Alien Property Custodian may in his discretion initiate a summary proceeding for allowance of any claim which he deems so clearly entitled to allowance that the public interest does not require contest thereof, of hearing thereon, by submitting to the Vested Property Claims Committee a recommendation for allowance, stating the facts considered in making the recommendation. The recommendation is made public and an opportunity is given any person asserting any objection to the allowance, to file within a specified time an application for a hearing. The committee may concur in the recommendation and issue a summary determination allowing the claim, or disagree with the recommendation of the General Counsel, in which case the claim will be set down for a regular hearing before the committee. In the latter case neither the recommendation or the dismissal of the summary proceedings shall be considered in the hearing.

PROPOSED LEGISLATION

Since its inception, the Office of Alien Property Custodian has been handicapped to some extent by reason of the absence of clearly articulated legislative intent and authority, particularly with respect to the methods to be followed in handling claims filed against the Custodian, the payment of creditors and the indemnity of directors and agents of the Custodian. The Alien Property Custodian has proposed to the Congress of the United States legislation which seeks to clarify the broad powers which have been delegated to him by Congress and the President.

H. R. 5031 (S. 1940) introduced in the House of Representatives in June, 1944, seeks to amend Title III of the First War Powers Act, 1941[6] by adding several new sections to the Trading with the Enemy Act, as amended, which deal with operating matters essential to a proper exercise of the Custodian's present day to day functions and which are considered immediately necessary by the Custodian in order to properly and promptly administer vested property.

Specifically, the Congress is asked to designate with particularity:

1. A method for the receipt and disposition of claims of American citizens and other persons who are not enemy citizens, who may claim the return of their property.

[6] 55 STAT. 838 (1941), 50 U. S. C. APP. (SUPP. III, 1941-1943) §616.

2. A method for the fair and equitable payment of claims of American citizens and other proper persons who are creditors of persons whose property has been vested.
3. A method by which the Custodian may pay taxes—Federal, State and local—with respect to vested property.
4. A method for the payment of the expenses of the Office of Custodian out of funds in his control without imposing any burden on the general American public.

The work of the Custodian is an important factor in the successful prosecution of the war and will contribute to the efforts of this nation in effecting a satisfactory adjustment of post-war problems.

By seizing the property of our enemies, the Custodian has not only deprived the Axis powers of any possible benefit or advantage which the ownership and control of property in the United States might give them, but also by using the property of our enemies to its fullest possible extent in our own war effort he has contributed to their defeat.

By protecting and preserving the property of our allies and friends, the victims of our enemies, the Custodian has endeavored to achieve a measure of confidence and regard towards this country on the part of these subjugated peoples which will be politically desirable and effective in the period of readjustment between the cessation of hostilities and the restoration of peace.

ENEMY PATENTS

HOWLAND H. SARGEANT* AND HENRIETTA L. CREAMER†

During the period between the last Armistice and the outbreak of World War II, foreign-owned United States patents served as one of the major instruments of Axis economic penetration through which a number of critical American industries were brought under the influence or control of enemy nationals. This in itself made the whole subject of the control, administration and ultimate disposition of enemy patents of prime importance at the time the United States entered the war.

The problem of enemy patents took on still wider significance because at the time the Alien Property Custodian was appointed the entire subject of domestic patent administration was under review and the acts of the Custodian were scrutinized for possible suggestions for general policy. Critics of the patent system contended that the patent privilege was the most extensively used instrument of monopoly control. Abuse of the patent privilege was singled out as one of the principal means by which domestic and international cartels maintained their monopoly control over our markets at home and abroad. Charges flew thick and fast that the abuse of the patent grant resulted in the suppression or postponement of new inventions, in the stabilization of artificial price levels, in power delegated to private groups to tax an entire industry.

Defenders of the domestic patent system maintained that it had largely accomplished what the framers of the Constitution had intended when they gave Congress the "power to promote the Progress of Science and useful Arts." They held that the basic principles of the present system should be preserved and that the patent system should be adjusted to meet existing conditions.

This was the setting into which the Custodian was projected when he was given authority to control foreign-owned United States patent interests. The Custodian's position has been that he does not have the primary responsibility for solving the general problems of monopoly under the anti-trust laws. He is working within the patent system as it exists. His job has been to put enemy controlled inventions to work in the American economy and his program up to the present time has been largely concentrated on the achievement of this goal.

* A.B., 1932, Dartmouth; B.A., 1934, M.A., 1938, B.Litt., 1940, Oxford University (Rhodes Scholarship). Chief, Division of Patent Administration, Office of Alien Property Custodian, since 1942; Executive Secretary of the National Science Fund of the National Academy of Sciences; Editor FEDERAL HOME LOAN BANK REVIEW, 1937-1940.

† A.B., 1932, Cornell University; M.A., 1933, Columbia University. Senior Economist, Division of Investigation and Research, Office of Alien Property Custodian.

Executive Order No. 9193, issued July 6, 1942,[1] gave the Custodian the authority to "direct, manage, supervise, control or vest" all foreign interests in patents. In the exercise of his broad powers, the Custodian has taken title to large numbers of enemy patents. He has, however, taken care not to disturb existing legitimate American, Allied, and neutral rights under enemy patents. Bona fide patent agreements have, therefore, not been upset; vested corporations have been permitted to retain and continue their own management of these patents which are necessary to and used in their business. However, in those cases where the use of foreign-owned patents by American industry was restricted by provisions which were either unlawful or contrary to sound public policy, the Custodian has been obliged to take affirmative steps to eliminate such controls.

Comparison of Basic Approaches, World Wars I and II

The patent policy adopted in World War II differs from the policy followed during the last war in two important respects: seizure and sale of patents. During World War I the Trading with the Enemy Act originally provided that enemy patents were subject to licensing only by application to the Federal Trade Commission (to whom the President's authority under Sec. 10 of the Act had been delegated) and that royalties were to be fixed equitably in court after the war. This procedure proved ineffective for the purposes of stimulating the use of enemy patents and was cumbersome in administration. Potential licensees were discouraged by uncertainty concerning their post-war rights and the prospects of litigation.[2] The Act was, therefore, amended to permit seizure of patents by the Custodian, but this change was not made until November 4, 1918, when hostilities had practically ceased. Approximately half of the 12,300 patents seized after November, 1918, were sold: about 5,100 to the Chemical Foundation, Inc.; about 1,120 to purchasers of vested corporations whose assets included patents. The remaining patents were licensed almost entirely to the Navy.

The announcement by the President on April 21, 1942, that he had directed the Custodian to seize all patents controlled by the enemy and that he intended to take steps to retain title to the enemy patents permanently in the Government constituted a basic change from the approach to the problem in World War I. For one thing, it ruled out the sale of patents.[3] Second, it meant that the Custodian would vest enemy patents immediately while they could be of use in war production.

[1] The Custodian's Office was created by Executive Order 9095, March 11, 1942, 7 FED. REG. 1971 (1942). Executive Order No. 9193 was an amendment of the earlier order and defined the Custodian's functions in more detail. 7 FED. REG. 5205 (1942).

[2] The Federal Trade Commission received applications for 246 patents and granted 76 licenses covering 206 patents. Less than a year after the war was officially declared to be ended, there were 131 suits pending in court in conformity with the provisions of the Act for obtaining royalties.

[3] The actual history of the treatment of enemy patents after the last war is more consistent with a policy of non-return than is generally realized. Despite post-war amendments of the Trading with the Enemy Act, directing return of patents to former owners, and the reversion of patents to enemy owners by way of business enterprises over which they regained control, less than 3,000 valid patents returned to former enemy owners. The other patents had either expired before there was any arrangement for return, or they remained in the hands of American businessmen who had purchased them as part of the assets of business enterprises, or they had been sold to the Chemical Foundation.

Experience during the last war had indicated that vesting was the most efficient method to encourage widespread use of enemy patents.[4] It was also considered advisable to vest the patent interests of nationals of enemy-occupied countries. Residents of countries overrun by the enemy were unable to prosecute patent applications which had been filed by them or to administer patents which they owned. In addition there was the danger that transfers of title would occur under duress. In order to safeguard the interests of these victims of the enemy and to encourage the use of these patents by Americans they were vested. To assure his control of all interests of foreign[5] nationals in patents for the benefit of Americans, the Custodian also vested such foreign interests in contracts relating to the use of patents licensed or assigned to Americans.

Extent of the Custodian's Patent Holdings[5a]

The Custodian has taken title to approximately 46,000 patents, patent applications, and unpatented inventions.[6] He is, therefore, the largest single patent holder in the United States with about 5 percent of the total number of unexpired patents now registered with the U. S. Patent Office.

It is impossible to evaluate in exact terms the economic significance of these patents, but they cover almost the entire range of fields in the classification used by the Patent Office. Licenses which have been made available cover highly strategic processes and products: beryllium production, tungsten-carbide technology, paint manufacture, high octane gasoline, polymerization of synthetic rubber, gyroscopes, marine propellers. The list also includes inventions relating to medicine, optical and magnetic instruments, radio and television, mining equipment.

PROMOTION PROGRAM

Since vested patents can contribute to production only when they come into use, the Custodian has taken the following steps to promote their use:

1. Published the specifications of more than 4,000 pending patent applications, thus making immediately accessible to American research and industry the most recent discoveries of foreign centers of research. This was an unorthodox step, since patent applications are usually maintained in strict secrecy until patents actually issue. Publication was considered appropriate as a means of assuring full knowledge of this important technical information by American science and industry during the war. Prosecution of vested patent applications by the Custodian's staff has resulted in the allowance of 2,193 patents. Six hundred thirty-two have been perma-

[4] The legality of seizure and analogous doctrines are treated elsewhere in this symposium: McNulty, *Constitutionality of Alien Property Controls, infra* p. 135.

[5] The Custodian has confined his vesting to patent interests of nationals of enemy and enemy-occupied countries. Hereafter, unless the terms enemy or enemy-occupied are specifically mentioned, the term "foreign" will refer to nationals of enemy and enemy-occupied countries, but not to other foreign nationals.

[5a] See tables toward the end of this article.

[6] This number does not include patents held by vested corporations and other patents which the Custodian also controls indirectly by way of vested contracts.

nently abandoned for lack of merit, and the remainder are under active prosecution before the Patent Office.

2. Published catalogues of vested patents and inventions.

3. Published abstracts of all vested chemical patents (about 8,000). These summary technical descriptions were prepared by the Chicago Section of the American Chemical Society in cooperation with the Office of Alien Property Custodian.

4. Is now publishing abstracts of all remaining patents and patent applications (approximately 37,000).

5. Organized libraries of vested patents on an experimental basis in Boston, Chicago, New York, Portland, Oregon, and Washington, D. C., serviced by technical field representatives. These men work closely with local and regional organizations to bring the vested patents into maximum use in their respective areas. Difficult war production problems have been solved with the assistance of the technical representatives. As reconversion becomes a reality, their job will be to help American business find in the vested patents new ideas, new products, and even new industries.

6. Exhibited a travelling library of vested patents in every major industrial area of the country. A staff of competent patent lawyers and technical men has been in attendance to assist potential users of the patents. Meetings of scientists and engineers, associations of businessmen, and Chambers of Commerce have placed their facilities at the disposal of the Custodian for such exhibits.

7. Collaborated with other Government agencies in finding new and productive uses for vested patents in military and civilian fields.

8. Cooperated with the Smaller War Plants Corporation in national and regional programs to assist small manufacturers in making more effective use of vested patents.

9. Provided Government agencies with lists of patents and inventions related to problems in which they are interested.

The only yardstick by which the effectiveness of the Custodian's program for putting enemy patents to work can be measured statistically at present is patent licensing reports. By November 15, 1944, the Custodian had received 1,526 applications requesting licenses under 15,460 vested patents. He had issued 1,100 licenses covering 8,181 patents. Analysis of more than 100 reports covering the use of 421 patents by licensees who had operated during all or part of the calendar year 1943 indicates that 21 percent of the patents licensed have already gone into production, and research was already in progress on an additional 56 percent of the licensed patents.

The licensing accomplished up to the present does not reflect in any great measure the probable use of vested patents during reconversion and post-war periods. The Custodian's licensing policy was announced by the President in December, 1942, and the statistics reported above, therefore, cover somewhat less than two years of licensing experience.

DISPOSITION OF VESTED INTERESTS IN PATENTS[7]

The patents which have come under the control of the Custodian fall into three broad groups:

1. Patents which had not been licensed prior to the date of vesting ("loose" patents);
2. Patents which had been licensed or assigned prior to the date of vesting;
3. Patents held by corporations vested or supervised by the Custodian.

The characteristics of these three groups were sufficiently distinct from each other to necessitate the formulation of different administrative policies for each group.

I. Patents Not Licensed Prior to Vesting

Enemy patents which were not already licensed to Americans at the time of vesting are licensed on a royalty-free, non-exclusive basis for the life of the patent. Patents which are vested from nationals of enemy-occupied countries are also licensed non-exclusively for the life of the patent. These licenses, however, are not royalty-free.

The Non-Exclusive Policy

The non-exclusive policy was adopted because it promised the fullest use of the largest number of patents and because it avoided the difficult problems which would have been involved in administering any other policy. Specifically, two other approaches were considered but discarded: complete exclusivity and completely free availability.

If the Custodian were to grant exclusive licenses, he would in each case have to determine the most appropriate recipient of the special privilege. The problem would be, therefore, to determine an effective guide in making the choice. One standard might be the price offered by the licensee for exclusivity. The Custodian could, for example, select the bidder who offered the highest royalty payment. He would not, however, be certain that the highest bidder was the highest qualified bidder. It would be necessary, in addition, to investigate the applicant's resources and his intentions to ascertain that the patent was not to be used to the detriment of the public welfare.

It was recognized, of course, that in some instances an exclusive license might be the only method of assuring full development of an invention. High development costs or the need for further experimentation, for example, might discourage a potential licensee from taking a non-exclusive license because of the fear that competitors would enter the field as soon as the invention was practicable and a market developed. The Custodian believed, however, that he could not readily determine before licensing which patents would be used most fully by the issuance of an exclusive license.

[7] Under a license the owner retains title to the patent but grants to the licensee the right to use the patent. When the Custodian vests a patent, he succeeds to the title.

Under an assignment title passes from the original owner to the assignee. The Custodian does not vest any patent which has been assigned to an American in good faith.

On the other hand, it was apparent, too, that making inventions available without any restrictions, by throwing them into the public domain, would also have defeated the underlying purpose of the Custodian's policy. Unless the Custodian was absolutely sure that the patents which he dedicated were free of legitimate claims, holders of interests in foreign-owned patents would have been uncertain of the status of their rights and serious damage might have resulted to Americans. It was probable also that potential users of inventions would have hesitated to employ inventions thus dedicated to the public because of the existence of an area of doubt concerning the legitimate interests of Americans in such inventions.

The administration of such a program would also have been difficult. Since anyone would be free to use the invention, the Custodian would have no precise knowledge of the number of persons who were using the invention or the effectiveness with which they were using it. By the act of dedicating a patent, the Custodian would even have lost the privilege of subsequently asking for its return. This would, therefore, have made it impossible for him to correct title mistakes in vesting. Moreover, on the basis of past legal experience it is questionable that the Custodian has the authority to dispose of property on royalty-free terms unless he also provides for the recapture of that property.[8]

By licensing those persons who apply to him on a non-exclusive basis, the Custodian knows who is using the patent and he is in a better position to determine how adequately the patent is being used. He is not faced with the difficult problem of evaluating the potentialities of the applicant and the invention before any license is issued.

Granting licenses to all applicants, however, does not always enable all licensees to use the invention effectively. When he began operation of his office, the Custodian did not know the exact nature of all the patents he held. It was apparent, however, that some of the licenses covering improvement patents vested by the Custodian could not be used without the basic or dominant patent. To prevent holders of dominant patents from consolidating their monopoly positions by acquiring improvement patent licenses from the Custodian, the early license forms contained a cross-licensing provision. This provision in the early forms was later eliminated because many companies, through a mistaken fear that they would be forced to release all their patent rights, basic and other, to anyone who wanted them in any field, refused to take licenses and because it was frequently almost impossible to ascertain how much cross-licensing was necessary. Actually no cross-licensing ever occurred. When the license agreement was changed, licensees under the old system were permitted to come under the new agreement.

Royalty Policy

Under ordinary circumstances the royalty compensates the inventor for his efforts in creating an invention and for his willingness to disclose it. When an invention

[8] See *infra* note 9.

has been made and disclosed, there is no further public purpose to be served in continuing the monopoly, except insofar as such protection is necessary as a means of preserving the patent system and its future flow of benefits. Any patent owner may dedicate his patent to the public if he sees fit, or give up his monopoly privilege in any degree he considers desirable, without endangering the patent system.

When the Custodian vests the enemy's interests in a United States patent, he succeeds to all of the enemy's privileges in the use of that invention. If he were to act as a private patent owner, the Custodian might value the patent only in terms of the income from its use or licensing, and would therefore have an incentive to govern the terms of his licenses so as to maximize that income. The Custodian could secure a monetary return for the use of a vested patent by granting an exclusive license, or by sale of the patent. He could secure a somewhat smaller income by issuing royalty-bearing, non-exclusive licenses.

If the benefits to be derived from licenses issued by the Custodian were narrowly restricted, it would be appropriate to demand royalties under the vested patents from the licensees. In such circumstances a policy of royalty charges would be justified even if no compensation was to be provided to the former patent owner. It was the judgment of the Custodian, however, that the patents vested as property of enemy nationals are of such widespread benefit to the public and of such basic importance to future improvements in the efficiency of production that a general policy of royalty-free licensing is justified. Although in a few cases benefits from the use of vested patents would be narrowly restricted, it was decided that it would not be administratively feasible to single out these cases and adopt for them a different royalty and licensing policy.

The Custodian was eager to secure the use of the inventions disclosed in his vested patents by all enterprisers who were interested in exploiting the inventions. By retaining title to the patents and making them freely available to all applicants, the Custodian assured all Americans that they would be able to use these inventions without any necessity of limiting production so as to meet royalty payments. He also eliminated the possibility that monopoly prices might be exacted under vested patents. The public would benefit through increased production and employment opportunities and lower prices, and through the stimulus to new inventions resulting from the unrestricted availability of many additional basic processes and products. During the war period, it was evident that most royalty charges imposed on licensees would be reflected in higher prices of Government purchases of war goods and private consumers' purchases of essential civilian commodities. A royalty-free policy for vested enemy patents also avoided delays and difficulties incidental to fixing royalties for a large number of patents. Absence of any standards for royalty rates makes their determination a delicate procedure open to the charge of "arbitrariness."

To defray expenses the Custodian charges an administrative fee of $15 for each patent license.

When the Custodian's patent policy was announced in January, 1943, it included the statement that in the case of patents formerly owned by nationals of enemy-occupied countries, licenses would be granted royalty-free for the duration of the war and six months thereafter.

At the request of certain governments-in-exile who complained that the Custodian's policy was discriminatory (i.e., as compared with the treatment accorded other friendly foreign countries), the royalty-free provision was revised, particularly in view of the small number of license applications. The present policy is to charge royalties from the time the license is issued. When a license is needed for immediate war production, however, it may be granted royalty-free for the war priod.

With the exception of patents relating to synthetic rubber, patents formerly owned by nationals of enemy-occupied countries have not been licensed royalty-free. Under an agreement between the Custodian and the Rubber Reserve Company the Custodian granted to Reserve a non-exclusive, royalty-free license, together with the non-exclusive right to grant royalty-free sublicenses to others, under all vested patents pertaining to synthetic rubber. Rights under vested enemy patents were granted to Reserve for the full life of the patents, but rights under patents vested as property of nationals of occupied countries were granted for the duration of the present national emergency only.

Licensing for the Life of the Patent

The exploitation of a patent usually requires some outlay of capital, and in certain cases the required expenditures may be very large. Licensees are, therefore, naturally reluctant to make capital investments to exploit patents unless they are sure that their licenses will continue in force for the life of the patent. In recognition of this fact the Custodian issues licenses under vested enemy patents for the life of the patent.

In the absence of express Congressional authority, however, a federal agency does not appear to have the power to dispose of property on royalty-free terms except upon the understanding that such property may be recaptured by the United States in the event the Government determines that other disposition must necessarily be made in the public interest. Licenses granted by the Custodian on royalty-free terms are, therefore, revocable.[9]

The Custodian was aware that this clause might deter some persons from apply-

[9] The revocability clause is based on precedent. The Attorney General has repeatedly ruled that government-owned patents, government-owned silver, and government-owned land may be licensed royalty-free or rent free if *there is a public benefit*, but the license *must* be revocable. 22 OPS. ATT'Y GEN. 240 (1898) (license granted to a Railway Company to lay track on Government land must be revocable); 30 *id.* 470 (1915), accord; 34 *id.* 320 (1924) (Navy Department may grant a revocable license under a Government owned patent; revocability emphasized); 40 *id.* (OP. No. 49, April 7, 1942) (Treasury Department may lease or grant a revocable license for use of "free silver" in place of copper for war production).

Federal Trade Commission licenses under Section 10 of the Trading with the Enemy Act were by their terms revocable at the absolute discretion of the Commission. Chemical Foundation licenses were revocable upon the unreviewable determination of the Trustees. (License par. 13.)

ing for licenses, and he has, therefore, made it clear that, except in cases where an interest adverse to that of the Custodian has been established, it is his policy to maintain such licenses, and he will not exercise the broad power of revocation in the national interest without notice and hearing. (Section 6(a) of the present patent license issued by the Custodian.) Section 6(b) of the Custodian's patent license provides: "If an interest in a licensed patent adverse to that of the Custodian shall be established the Custodian may at his option terminate or renegotiate this license after notice to the licensee." This is for the protection of innocent third parties in the event that previously unknown interests in the licensed patent are brought to light. With this sole exception, it seems evident that licenses issued by the Custodian will not be revoked unless the licensee himself fails to live up to the terms of the license agreement.[10]

Special Advantages of a License from the Custodian

The license granted by the Custodian is not a warranty that the manufacture, use or sale of any licensed invention does not infringe the valid patents of others. This is in keeping with the principles of the patent law. A patent does not confer an affirmative right to practice the invention; it provides only the negataive right to prevent others from doing so. Under a vested patent, therefore, the Custodian's licensee obtains no greater rights than those of the original owner.

The licensee does, however, obtain certain special advantages from a license issued by the Custodian. The licensee is assured (1) that a careful search has been made of all outstanding interests in the licensed patent; and (2) that the Custodian will defend him to the full extent of his legal power in suits which are brought by former enemy owners in the United States Courts, where the title or authority of the Custodian is drawn into question.

The Custodian's records of foreign interests in United States patents are the most complete records of their kind available in the country. They cover not only information obtained from a search of Patent Office files, but also detailed information obtained from reports submitted to the Custodian under requirements of certain General Orders.[11]

Section 5(b) of the Trading with the Enemy Act, as amended, contains a provision exculpating any person acting in reliance on the Custodian's action. The comparable provision in the original Act (Section 7(e)) has already received judicial

[10] During and after the last war, licenses issued by the Federal Trade Commission, the Alien Property Custodian, and the Chemical Foundation were revocable without cause. None of the licenses, however, were revoked without cause, and no enemy patents were returned to former owners without specifically keeping in effect all the licenses issued by these agencies which were still in force at the close of the war.

[11] General Order No. 2 issued by the Alien Property Custodian required nationals of designated foreign countries to report all interests in United States patents and patent applications. 7 FED. REG. 4634 (1942), 1 C. C. H. War Law Serv. (Statutes, Proclamations, Interpretations) ¶7202. General Order No. 3 required filing of a report by any person to whom a patent was granted while he was a citizen or a resident of a foreign country and any person claiming interest in such patent and who, since filing application for the patent, has changed citizenship or moved out of the designated foreign country. 7 FED. REG. 4635 (1942), 1 C. C. H. *op. cit.*, at ¶7203.

approval.[12] The exculpatory clause is a protection to the licensee who may, on the basis of it, remit a plaintiff in accordance with the intention of the statute to his remedy against the Custodian himself. Every license agreement carries this exculpatory clause. The Custodian has undertaken the defense of such suits to protect the licensee against the burden of nuisance litigation: "The Custodian will defend to the full extent of his legal power his authority to issue this license, to vest the licensed patents, and to cut off the rights of the former enemy owners, in any litigation brought against the licensee, or arising under this license, where the title or authority of the Alien Property Custodian is drawn into question." The Attorney General in an exchange of letters has assured the Custodian that the Department of Justice will represent the Custodian in suits brought against licensees where the Custodian's title to the patents vested is drawn into question, whether or not the challenge to his title is in specific terms.

II. Patents Licensed or Assigned Prior to Vesting

A large number of patents of foreign origin in use in the United States had been licensed or assigned to Americans before the Custodian undertook his vesting program. Where such licenses and assignments represented bona fide agreements of a lawful nature between Americans and foreign nationals, the Custodian's policy was not to disturb them. In some cases the agreements were in the form of exclusive or non-exclusive licenses, i.e., the foreign owner retained title but granted the use of the patent either to a single licensee or to several licensees. In assignments title to the patents was transferred to the assignee or purchaser. In return for these rights the licensee or assignee contracted to make certain monetary payments or to perform certain acts. For example, the contract might provide that the licensee or assignee exchange patents with the licensor or assignor. Frequently the contract also provided for the control of manufacture or sale under the patent.

The policy formulated for this group of patents was of necessity different from that applied to "loose" patents since protection of legitimate American interests was part of the total public interest. The Custodian, therefore, made no attempt to disturb exclusive licenses and assignments where lawful agreements had been legitimately executed and did not conflict with the public interest.

The real problem, of course, was the extent to which the Custodian could legally abrogate and change existing license and assignment agreements when they did not conform with the public interest. In his testimony before the Senate Committee on Patents on April 27, 1942, Leo T. Crowley, then Custodian, stated:

"We believe that the primary purpose of vesting and administering foreign-owned patents is to break any restrictive holds which these patents may have on American industry, particularly restrictions which may operate to impede war production. We propose to seek out such restrictions, with the aid of the Department

[12] See Great Northern Ry. v. Sutherland, 273 U. S. 182, 194 (1927); Garvan v. Marconi Wireless Telegraph Co., 275 Fed. 486, 488 (D. N. J. 1921).

of Justice, the Board of Economic Warfare, and others, and to break them wherever we find them, by whatever means may be available."

Royalty Policy

Where patents were licensed on an exclusive basis, the Custodian continues to collect whatever royalties had customarily been paid to the foreign owners. The reason for this policy is twofold: by vesting the Custodian becomes successor to the foreign interest and is, therefore, entitled to those benefits which formerly accrued to the foreign owner. Moreover, since the royalty payments had been based on the right to certain exclusive privileges, the elimination of the royalty charge would be in the nature of a "windfall" gain. The Custodian is willing to exchange royalty-bearing, exclusive licenses under former enemy-owned patents for non-exclusive, royalty-free licenses.

Where non-exclusive licenses were already outstanding to Americans under patents vested from nationals of enemy-occupied countries, others were licensed, upon application, on the same royalty terms as the licenses already oustanding.

Patent Contracts

As of June 30, 1944, the Custodian had vested the interests of foreign nationals in 624 contracts relating to American patents. Basically patent contracts are agreements which specify certain conditions which govern the use of a patent by an assignee or licensee. Where a patent had been licensed to an American, the Custodian vested the patent and the foreign interests in any contractual relations governing the patent. Where a patent had been legitimately assigned to an American, the Custodian vested the foreign interests in the contract which governed the use of the patent.[13]

The main objectives in seizing interests in patent contracts are: (1) to obtain effective control over the patents and patent rights involved in such contracts; (2) to absorb funds which might otherwise be employed for the benefit of the enemy; (3) to prevent windfall gains to American licensees or assignees; and (4) to make it possible to remove unlawful or undesirable provisions which impose restraints on production or trade.

Nearly every patent contract has some provision requiring the licensee either to pay royalties, or to provide certain services, or to supply certain products and information, or to provide the licensor with the benefits of future improvements or rights which the licensee may develop or acquire.

The contract provisions do not in themselves indicate the effect which these provisions may have had on our economy. Such effects depend not only on the provisions governing the use of the patents but also on the existence of other related patents, unpatented substitutes, and, in general, on the position of the contracting parties in the industrial fields to which the patents are related.

[13] If the assignment were made merely to avoid vesting of the patent by the Custodian or if the patents assigned under the contract are subject to so many restrictions that the contract is in effect a license, the Custodian may take title to the patents.

Provisions of Contracts

A detailed examination has been made of the provisions in more than half (333) of the 624 contracts in which the Custodian has vested foreign interests.[14] No claim is made that these contracts are illustrative of typical provisions in domestic patent agreements, nor at this stage of administration of the vested patent contracts could it be said with any assurance that this group of contracts studied is representative of patent agreements between Americans and foreign nationals. The results of this statistical study are of interest, even with these qualifications. Certain types of provisions are fairly common in this group of contracts. For example, 59 percent of the agreements provided for the license or assignment of future patents. In some cases the provisions refer only to related patents, e.g., the contract may require that the licensee shall confer upon the licensor rights to any patent improvements and that new related patents secured by either party to the contract shall be subject to similar requirements. Whether the provisions cover all patents or only related patents, the intent is the same: agreements can be kept in force almost indefinitely since new patents are licensed or assigned under the same agreements before the original patent grant expires. Restrictions of this type may also discourage research to improve the original product or to develop substitutes.

In 43 percent of the contracts there were provisions relating to the field of use of the patents. Such provisions may serve legitimate purposes, such as assuring lower rates of royalty for minor uses of the patent, or safeguarding the patentee against unintentional sale rather than license of the patent. Restrictions on the field of use may also be employed as one method of dividing markets among producers. In some instances, non-exclusive licenses with severe restrictions on the field of use may serve to eliminate competition as effectively as an exclusive license.

Another device for dividing markets is the export restriction. In 38 percent of the contracts examined there was some provision for this purpose. Each party to the contract may agree not to sell in territory assigned exclusively to another or not to sell to customers who are likely to export to a specified territory.

Price fixing agreements and controls over investment, output, and sales are much less frequent than export or field of use restrictions. Where territories or fields are divided, determination of the level of production and price is usually left to the discretion of each party.

Several contracts specifically provided for the purchase of certain products to be made only from the licensor. Some of the contracts in this group restrict the licensee in the manufacture or sale of competing products and in the use of products or patents other than those directly involved in the particular license. Some agreements restrict the interests which may be held in concerns handling competing products. Such provisions are designed to protect the competitive position of the licensor by enabling him to secure commitments from his licensees which they might

[14] Of those contracts studied, 160 were exclusive license agreements; 78 were non-exclusive; and 95 were assignments.

be unwilling to make under other circumstances. This use of the patent right is an extension of privilege to fields unrelated to the patent itself.

Almost all these international patent contracts include provisions for the exchange of information, e.g., results of technical experimentation; data concerning output, sales, price, and profit.

Custodian's Policy of Abrogating Restrictive Provisions

Contracts in which the Custodian vests an interest may contain various restrictive provisions and to the extent that the contracts have not been suspended or abrogated because of the war, these provisions remain in effect. Some of these restrictions are illegal under the anti-trust laws; others, although not illegal, may be undesirable from the broad viewpoint of public interest. The Custodian has adopted the policy of attempting to remove restrictions of both types wherever possible.

Restrictions on the use of patents, on the quantities of patented products which may be produced, and on the prices at which they may be sold, have, under certain circumstances, been held by the courts not to be illegal.[15] Where such legal restrictions exist in contracts to which the Custodian has become a party, the Division of Patent Administration discusses them with the American parties to the contracts to determine whether certain public advantages could be obtained by the removal of such restrictions. If all parties to the contract consent voluntarily, the restrictions are removed.

In a few instances, for example, American parties to patent-licensing or assignment agreements have been relieved by the Custodian from observing restrictions on the right to export products made under the claims of the licensed or assigned patents. Since most current exporting is in promotion of the war effort and is carried on largely through lend-lease, it has not been affected by these provisions. When the time comes for the restoration of the peacetime commerce of the United States, it will be important that there shall exist no privately created barriers to that commerce. In other cases the licensee, at his request, has been freed from all provisions of the patent contract by exchanging his exclusive license for a non-exclusive, royalty-free license.

Administration of Patent Contracts

In order that he may be able to deal with restrictive provisions of agreements which appear contrary to public policy and to take effective steps to remedy unlawful restraints contained in vested patent contracts, the Custodian established a special operating staff to administer patent contracts within the Division of Patent Administration early last year. Responsibility for reviewing all vested contracts and

[15] As recently as 1940 in a unanimous decision dealing with restricted licenses, the Supreme Court restated the law as follows: "The patent law confers on the patentee a limited monopoly, the right or power to exclude all others from manufacturing, using, or selling his invention. . . . He may grant licenses to make, use, or vend, restricted in point of space or time, or with any other restriction upon the exercise of the granted privilege, save only that by attaching a condition to his license he may not enlarge his monopoly and thus acquire some other which the statute and the patent together did not give." Ethyl Gasoline Corp. v. United States, 309 U. S. 436, 456 (1940).

for undertaking whatever negotiations may be necessary in the public interest is placed in this Division. Existing agreements are to be modified, both at the request of American parties and on the Custodian's own initiative; negotiations are to be conducted to revise existing royalty rates when the Custodian is requested to do so by other Government agencies; restrictive provisions of patent agreements are to be eliminated where such provisions hamper American licensees or are contrary to the national interest; and action is to be taken with regard to unlawful contracts so that the patents involved can be released for general use. The Custodian's Office has worked out a plan of consultation and cooperation with the Department of Justice in the treatment of those contracts.

Although the Custodian is prepared to take court action to test the lawfulness of contracts where evidence of illegality exists, the plan of operation now in effect emphasizes the desirability of voluntary negotiation. American parties to vested contracts will be offered every opportunity to discuss restrictive provisions and other undesirable elements in the contracts and to reach a voluntary settlement.

III. Patents Held by Vested Corporations

When the Custodian vests the enemy interests in a corporate enterprise, he exercises his control through the selection of management personnel. This personnel is then entrusted with the administration of all the assets of the enterprise. In many companies patents are important assets: they may determine the ability of the firm to compete with other enterprises in the same field and they constitute marketable assets, sometimes of very great value. In some instances the patent assets largely determine the value of the non-patent assets. In view of these considerations and of the fact that Americans, Allies, and Neutrals frequently hold minority interests which he wishes to protect, the Custodian has consistently sought to preserve the value of the assets of the vested corporations. Patents of vested corporations are, however, administered in accordance with certain broad policies laid down by the Custodian. Of first and primary importance is the policy that no patent held by a corporation controlled by the Custodian shall be withheld from use in war production.[16]

The disposition of patents related to the anti-malarial drugs, Atabrine and Plasmochin, illustrates how a corporation, in which the Custodian's interest is indirect and not controlling, has made available patent rights of special military impor-

[16] General Aniline & Film Corp., for example, the largest corporation controlled by the Custodian, announced the following policy in its ANNUAL REPORT, 1943: "All patent holdings are available for licensing for war requirements upon request of the proper Government authority.

"Patent rights in those fields in which the company is not actually engaged are available for licensing on reasonable terms and royalties to responsible and capable interests to the end that the most effective use may be made thereof in the varied phases of war production.

"Patent rights in those fields in which the Company is actually engaged are also available for licensing for the duration of the war, on reasonable terms and royalties, to responsible and capable licensees when the company is unable to supply the products it manufactures under such patents in sufficient quantities to meet the demands for war use or vitally war-connected use, or when it is so requested by proper Government authority."

tance. The patents covering these anti-malarial drugs had been assigned before the war to the Winthrop Chemical Company in which General Aniline and Film Corporation held a 50 percent stock interest. Under an agreement of May 8, 1942, among the interested enterprises, the authority to decide all matters concerning production of Atabrine was delegated to the Custodian. Licenses to produce the drug for use by the Government have been granted royalty-free to 11 companies for the duration of the war and six months thereafter. Under this licensing arrangement the production of Atabrine rose from 40,000,000 tablets in 1941 to 1,946,485,000 tablets in 1943.

Wherever patents held by vested corporations can be licensed non-exclusively without jeopardizing the competitive position of the firm, they are to be licensed by the vested corporation at a reasonable royalty fixed by the management. Schering Corporation, for example, circulated a list of 160 patents which it was willing to license on this basis.

Patent Holding Companies

A number of the vested and supervised corporations are patent holding companies and patent agencies, i.e., companies whose primary business is the licensing of patents which they own or which they have the right to exploit.

The patents held by these companies are administered by their managements in accordance with two basic policies laid down by the Custodian. Where a patent holding company owns patents which it had not licensed exclusively prior to vesting, the patents are licensed (1) non-exclusively, and (2) at reasonable royalty rates which are fixed by negotiation between the management and the licensee.

It is intended to liquidate patent holding companies wherever there are no significant non-enemy interests or creditor obligations and the company does not serve some particularly useful function. Patents are to be turned back into the Custodian's pool of patents to be licensed non-exclusively and royalty-free in the same manner that "loose" patents are administered.

The practical difficulties involved have made dissolution of patent holding companies slow work: in addition to complications of non-patent assets, auditing, outstanding debts, minority non-enemy interests, etc., litigation is a retarding factor. When a person who is qualified to sue brings an action under Section 9(a) of the Trading with the Enemy Act, seeking the return of stock or patents allegedly vested by mistake in error, no disposition of the property occurs until a determination of actual ownership is reached.

In the case of sale there are similar types of purely administrative problems which are equally complicated and time consuming. In addition, there is the problem of valuation of patent assets. Since holding companies derive their income from royalties, any renegotiation of such royalties necessitates a revaluation of the company.

STATISTICAL ANALYSIS OF THE CUSTODIAN'S PATENT HOLDINGS

Table 1 indicates the total number of patents, patent applications, unpatented inventions, and patent contracts vested by the Custodian. German interests were the largest group vested.

Table 2 is a distribution of the vested patents, patent applications, and unpatented inventions, according to the industries to which they relate.

TABLE 1

INDUSTRIAL PROPERTY IN WHICH INTERESTS WERE VESTED MARCH 11, 1942-JUNE 30, 1944, CLASSIFIED BY TYPES OF PROPERTY AND NATIONALITY OF OWNERSHIP[a]

Class of Property Vested	*Ownership by Nationals of:* Enemy Countries	Enemy-Occupied Countries	Enemy and Enemy-Occupied Countries	Total
Patents	28,657	11,170	40	39,867
Part Interests in Patents	178	78	1	257
Patent Applications	3,374	1,241	2	4,617
Abandoned Patent Applications	386	93	1	480
Inventions	587	242	..	829
Patent Contracts	471	139	14	624[b]

[a] This table does not include all types of industrial property vested by the Custodian. He also vests trade-mark and copyright interests which are discussed in the preceding article of this symposium. This table does not include the number of patents held by vested corporations.

[b] The Custodian vested 877 separate interests in these contracts.

TABLE 2

DISTRIBUTION OF VESTED PATENTS,[a] PATENT APPLICATIONS, AND UNPATENTED INVENTIONS (By Industry to Which They Relate)

Industry	Number of Patents, Patent Applications, and Unpatented Inventions
Machinery (except electrical)	6,624
Chemicals	4,327
Automotive Equipment and Automobiles	3,613
Electrical Machinery	3,460
Radio	2,151
Printing and Publishing	1,826
Mining and Metallurgy	1,785
Telephone and Telegraphy	1,784
Petroleum and Coal	1,720
Iron, Steel and Non-Ferrous Metals	1,686
Textiles	1,547
Stone, Glass and Clay	1,516
Plastics	1,240
Paper and Paper Products	1,122
Foods and Beverages	905
Apparel	887
Marine Propulsion	873

[a] The total shown here is smaller than the total indicated in Table 1. This distribution was based on vestings at an earlier date.

Aeronautics	873
Firearms and Ordnance	774
Railways	443
Buildings	424
Tobacco	378
Amusement Devices	357
Locks and Hinges	293
Rubber	232
Agricultural Processes and Machinery	224
Lumber	180
Tools	107
Leather	96
Miscellaneous	3,031
Total	44,796

ULTIMATE DISPOSITION OF VESTED PATENTS

The determination of the policies to be followed in the disposition of vested patents and of what agencies shall have the authority to effect those policies at the end of the war is entirely within the province of Congress. The Custodian has thus far made no suggestions, and although two bills concerning the final disposition of vested property have already been presented to Congress, no action has yet been taken on them.[17]

The Custodian has assumed that Congress will want to provide for the return of the patents vested as property of nationals of *occupied countries* to the former owners as rapidly as possible after liberation. The vesting of their patents was designed to conserve and protect the property and to assure its effective use in our own war program.

The vesting of the patents of enemy nationals and the issuance of royalty-free licenses under them does not necessarily mean that the enemy nationals or their governments cannot eventually receive compensation for these patents. Whatever income the Custodian now receives for patents is distinctly divorced from both those claims for compensation which the enemy may later make and from the recognition which Congress may later take of those claims.

On the basis of Congressional action at the end of World War I, it is reasonable to assume that projected legislation will not affect adversely the current decisions being made by the Custodian in the administration of vested patents. After the last war, outstanding sales and licenses were confirmed, and all permitted returns were subject to the licenses, contracts, liens, and encumbrances created by action of the Alien Property Custodian. It is unlikely, therefore, that enemy patents seized during this war will be returned to their former owners or that American interests acquired in good faith will be disturbed.

[17] H. R. 3672 (Gearhart Bill) 78th Cong., 1st Sess. (Nov. 15, 1943); S. 2038 and H. R. 5031 (same bill) 78th Cong., 2d Sess. (June 23, 1944).

CARTELS AND ENEMY PROPERTY†

HERBERT A. BERMAN*

Prior to our entry into the war, property in this country owned by our present enemies was frequently subject to international cartel agreements.[1] Now that we are at war, such agreements affect the administration of enemy property, in the location and seizure of such property, its management while held by the Custodian, and even its ultimate sale or other disposition.

CARTELS AND THE SEIZURE OF PROPERTY

Concealing Ownership of American Companies

In the decade preceding the outbreak of the present war, German firms owning business enterprises in the United States contrived a number of ingenious devices to camouflage the ownership of such properties, but the most effective methods were those dependent on the services of some cartel partner domiciled in one of the other continental European countries. Because of the partnership atmosphere generated out of the cartel relationship, or more often because of the fear that the domestic companies might fall into the hands of some person not connected with the cartel and thus generate competition with the cartel, cartel members lent their services in peacetime to German efforts to frustrate the seizure of such companies in the eventuality of another war between Germany and the United States.

The case of the Schering Company illustrates this point. Schering A. G. of Berlin, a prominent German chemical concern, was a member of a European pharmaceutical cartel which included Dutch and Swiss corporations. In 1937 the German company decided to adopt measures to cloak its ownership of the Schering Corporation of Bloomfield, New Jersey, and transferred its controlling stock interest in the company to a prominent Swiss bank. The mystery of why a Swiss bank desired to purchase a business manufacturing medical specialties in the United States was dissipated when it is understood that the bank was closely affiliated with a

† The views expressed in this article are those of the author and do not in any way reflect the views of the Alien Property Custodian.

* A.B., 1924, LL.B., 1927, Harvard University. Member of the New York and District of Columbia Bars. Special Assistant to the Attorney General, Chief of the Cartel and Patent Section, Antitrust Division, Department of Justice. Formerly counsel for the Senate Civil Liberties Committee, and Chief Counsel and Assistant Director of Housing, Public Works Administration.

[1] "Cartel" is merely a convenient term of reference for a certain type of agreement in restraint of trade. As used in this article, it will refer to an agreement designed to eliminate competition which affects our foreign and domestic commerce, one of the parties to which is a national of a foreign country. Such agreements commonly violate the Sherman Act, 26 STAT. 209 (1890), 15 U. S. C. (1940 ed.) §1 *et seq.*

Swiss member of the cartel, and that Schering of Berlin retained a beneficial interest in Schering of Bloomfield. The Alien Property Custodian has vested the stock of Schering of Bloomfield because of Schering A. G.'s interest in the Bloomfield concern.[2]

The Custodian has successfully pierced the network of camouflage erected over certain domestic companies by German nationals. There are, however, other domestic companies, ostensibly owned by nationals of neutral or allied countries, suspected of being in reality German-owned or controlled via the medium of cartel arrangements. Although the Custodian has the statutory power to vest any foreign property, and could conceivably have vested all foreign-owned companies suspected of being enemy-owned or controlled, he has vested only those domestic enterprises which could be proven to be enemy-owned or controlled. Concern for the legitimate interests of one of our allies or of a neutral country and an awareness of the diplomatic repercussions which would have ensued if all foreign-owned domestic companies were vested, together with a belief that a painstaking investigation of each such company would determine true ownership, may have prompted this policy. Because of the difficulties of securing proof, some enemy-owned enterprises may, however, escape seizure through the assistance of cartels.[3]

Transfer of Patents

In the examples above referred to, cartels have merely attempted to screen the real ownership of American assets, and where the real facts have been developed the enemy property in this country could be vested. However, in another category of cases, involving principally patents, participation by American concerns in cartels with German companies may have completely blocked the possibility of vesting the property in this country even though the true facts are known. In these cases, German companies have made bona fide transfers of United States patents to American-owned companies in anticipation of war and in order to avoid seizure after the outbreak of war.

The best publicized example of the transfer of patent rights to avoid seizure as enemy property is the case of the readjustment of patents held by the Jasco Company (a domestic corporation jointly owned by Standard Oil of New Jersey and the I. G. Farbenindustrie). Standard and I. G. Farben were parties to a cartel arrangement which surrendered to Standard Oil Company of New Jersey rights under certain of I. G. Farben's present and future patents for use in the oil indus-

[2] Criminal and civil proceedings charging violation of the Sherman Act were brought by the United States against the Schering Corporation of Bloomfield and other American cartel participants in the United States District Court for the District of New Jersey in 1941. The defendants pleaded nolo contendere to the criminal information and consented to the entry of a decree in the civil case terminating their connection with the cartel. See also hearings on the hormone cartel before the Kilgore Subcommittee on War Mobilization, *Hearings before Subcommittee of the Committeee on Military Affairs, Senate, pursuant to S. Res. 107 and on S. 702*, 78th Cong., 1st Sess. (Dec. 9, 1943), Part 10.

[3] Vesting by the Custodian is of course not conclusive upon the real owner. If the claimant can establish that he is not a foreign national and is the real owner of the vested property, he may sue for its recovery. See McNulty, *Constitutionality of Alien Property Controls, infra*, this symposium, at 135.

try outside of Germany and gave to the I. G. Farbenindustrie control of certain of Standard's chemical developments.[4] As part of this cartel I. G. Farben and Standard Oil (New Jersey) had placed with Jasco certain rights respecting patents to valuable processes, including synthetic rubber, issued by many countries throughout the world. After the outbreak of the European war in 1939, Standard and I. G. decided to take measures to prevent the seizure of their patent rights in certain fields by the various belligerent countries. Jasco, wherever possible, took over record title to the patent rights for the United States and the French and British Empires, while I. G. took over record title to the rights for the rest of the world. The parties believed that their arrangements would (in the words of a Standard official) "leave us in full control of the situation without interference of any government as regards the processes in question for the United States, the British Empire, and the French Empire."[5]

Situations of this sort present to the Custodian problems of great difficulty. Cartel relations make it likely that after the war American companies will return patent rights conveyed even without a formal commitment to do so, or will make some compensating arrangement. For example, as part of the Jasco adjustment referred to above, Standard and I. G. Farben entered into an arrangement (intended to be morally binding but legally unenforceable) to exchange regular reports of the financial returns and to correct any financial inequity, as judged by their original agreement, resulting from the rearrangement.[6]

Even though a transfer was made in contemplation of (though prior to) the outbreak of war, and to avoid seizure, if the transfer is in fact bona fide, absolute and without qualification, it is doubtful whether the Custodian has the power to vest the patents.[7] On the other hand, if the transfer was not bona fide and was made with the intent of reserving an interest in the patent rights to the German company, the Custodian can regard the transfer as a nullity and vest the patents. The line between the two situations is difficult to discern from the hazy indications of the parties' intentions shrouded in a cartel relationship the existence of which may not even be known.[8]

[4] Criminal and civil proceedings were brought by the United States in March 1942 against Standard Oil Co. (New Jersey) and certain of its subsidiaries charging violations of the Sherman Act based on the agreements between Standard and I. G. Farben. The defendants pleaded nolo contendere to the criminal information and consented to the entry of a decree in the civil case terminating the cartel arrangements.

[5] *Hearings before the Committee on Patents on S. 2303 and S. 2491*, 77th Cong., 2d Sess. (1942) part 6, 2921.

[6] *Id.* at 2920. The patents of I. G. Farben involved in the arrangement have been vested by the Custodian (*infra* p. 114). If the action of the Custodian in vesting such patents is sustained, such patents cannot of course now be returned to I. G. Farben unless Congress enacts legislation making such return mandatory.

[7] Stöhr v. Wallace, 269 Fed. 827 (S. D. N. Y. 1920), aff'd 255 U. S. 239 (1921); Magg v. Miller, 296 Fed. 973 (App. D. C. 1924).

[8] If a cartel relation exists and relates to patents and there is any foreign interest in the patents, General Order No. 2 issued by the Custodian requires the reporting of the facts to the Custodian. Criminal sanctions are provided for concealment.

CARTELS AND THE MANAGEMENT OF SEIZED PROPERTIES

Even if the barriers imposed by cartels do not prevent the vesting of the enemy-owned property, cartels continue to pose problems in its administration. These difficulties are increased by the terms of the law under which the Custodian derives his powers. The statute simply provides that enemy property "shall be held, used, administered, liquidated, sold or otherwise dealt with in the interest and for the benefit of the United States."[9] Under the statute the Custodian is an officer of the United States, and vests property for the exclusive benefit of the United States. Despite the title of his office, the notion that he is in effect a trustee for the enemy owners was long ago dispelled.[10] Nevertheless his duty in administering the property for the best interests of the United States may be primarily to conserve the value of the property.[11] As a public official, the Custodian has recognized an obligation to wage economic warfare upon the enemy and to carry out public policy by taking measures to destroy cartels. It is evident, however, that the requirements of public policy may not always be completely in harmony with the obligation upon the Custodian to conserve the value of the seized property. Although the Custodian shares the interest of the Antitrust Division of the Department of Justice in curbing cartels and is striving to cope with the problem, his primary function in the absence of further legislation is to administer vested property in a manner which he deems effective.[12]

Management of Business Enterprises

The policies actually adopted in the administration of vested property have varied with the type of property involved. In the management of seized business enterprises, the policies appear to be based upon the concept that the Custodian is obligated to protect the value of the asset vested. The management of such companies has been delegated to Directors nominated by the Custodian who have managed the companies in much the same way as other private corporations. The Directors have apparently followed the normal business urge of trying to make as much money for the companies as possible. They have not attempted to furnish the public with

[9] Sec. 616 of Title III, First War Powers Act, 1941, 55 STAT. 839 (1941), 50 U. S. C. App. (Supp. 1941-1943) §616.

[10] The enemy owner loses all interest in the property after seizure. Vesting is equivalent to confiscation. Munich Reinsurance Co. v. First Reinsurance Co., 6 F. (2d) 742 (C. C. A. 2d, 1925); and see Becker Steel Co. v. Cummings, 296 U. S. 74 (1935). Cf. Dulles, *The Vesting Powers of the Alien Property Custodian* (1943) 28 CORN. L. Q. 245; McNulty, *Constitutionality of Alien Property Controls, infra,* this symposium, p. 135.

[11] After the close of the last war, legislation was enacted directing the return of the proceeds of seized property to the former owners, subject to a prior lien created for the benefit of American citizens having claims against the German government. No legislation of this character has yet been passed with regard to the property seized in this war. If such legislation is enacted the preservation of the property by the Custodian for the benefit of the United States will redound to the ultimate benefit of the former owner.

[12] An example of the Custodian's attempt to curb cartel practices is the provision inserted in the Custodian's Standard Patent License Form. "Section 5. Limitations on Use: No licensed patent shall be used in furtherance of any unlawful cartel or combination or in any other way which is contrary to the laws of the United States."

the particular commodities manufactured at the lowest possible cost (allowing for reasonable profit), which would presumably be the objective of a governmental manager acting for the general public benefit.

This type of policy has sometimes tended to perpetuate the results of cartel practices. For example, for many years a cartel dominated by German companies fixed the price at which potash, an essential fertilizer ingredient, was sold in the United States. The American Potash and Chemical Company, one of the principal domestic potash producers, was secretly owned by members of the potash syndicate and American Potash sold its product at the same price as that fixed by the cartel. After seizure by the Custodian, that company continued to sell its product at the level formerly fixed by the cartel.

It should be noted in this connection that if any other policy had been attempted the Custodian would have been severely criticized, charged with fostering government competition with private enterprise. Certainly he has no Congressional mandate to socialize the companies seized or to enter into competition with private industry on a non-profit making basis. In addition, it is evident that the rights of any outstanding non-enemy minority stock interest in the seized companies must be respected. It is not suggested that in view of the Trading with the Enemy Act and the Executive Orders creating the office of the Alien Property Custodian, he should have adopted any other policy.

Under the circumstances, however, the Department of Justice has felt that it had no other alternative but to consider the vested companies, despite their ownership by the United States, subject to the antitrust laws, just as any other private business.

For example, in Sepember of 1944 an indictment and a civil complaint were filed against the American Potash and Chemical Company, which had been vested by the Custodian, charging that company, together with other persons, with participating in a cartel restraining and monopolizing trade in borax and boric acid.[13] If any vested companies have violated the Sherman Act, they have evidently done so without the knowledge or consent of the Custodian. The Custodian directed American Potash and Chemical Company to withdraw from a Webb Export Association charged with engaging in illegal practices when such charges were brought to his attention. I am advised that all vested enterprises were directed by the Custodian to comply with all applicable laws.

Administration of Patents

Policies adopted in the administration of seized enemy patents, however, have apparently not been determined by a desire to preserve asset values. Pursuant to instruction from the President, no attempt is made to exploit seized patents for the sake of the revenue that might be derived from such exploitation. As a general practice, revocable royalty-free licenses are issued to any person under any patent seized by the Custodian; doubts as to the Custodian's authority to give away gov-

[13] United States v. Borax Consolidated Ltd., *et al.* (U. S. Dist. Ct., N. D. Calif. Southern Div., Sept., 1944).

ernment property have prevented the issuance of irrevocable royalty-free licenses. However, exclusive licenses outstanding in the hands of American companies are respected, and the Custodian will not license any patent subject to such an exclusive license, due to concern for the legitimate property interests of American companies.

Exclusive licenses by enemy concerns to American companies are, however, frequently part of an illegal cartel arrangement. If the Department of Justice secures an adjudication that the exclusive license is unlawful, the Custodian is then in a position to license the patents concerned without respecting the exclusive license to the American company.[14] Where illegality is too plain to require adjudication, the American company may agree with the Custodian to acknowledge the Custodian's licensing right.

The cartel arrangement between Standard Oil Co. (New Jersey) and I. G. Farbenindustrie illustrates the type of question that may arise in the administration of patents subject to an exclusive license which is part of an illegal cartel. As part of the cartel arrangements I. G. Farben had granted an exclusive license for use in the oil industry to Standard under certain of its present and future patents, while Standard had granted control to I. G. Farben of certain of its future chemical developments. In a consent decree entered in the U. S. District Court for the District of New Jersey, the Court required Standard to license all of the patents which were involved in the conspiracy to any person requesting a license, such licenses to be royalty-free for the duration of the war and six months thereafter, and at reasonable royalties for the remainder of the life of the patents. These patents covered such valuable processes as synthetic rubber and aviation gasoline. The Custodian, as successor to I. G. Farben's interest in the patents, became a party to the decree and consented to its entry, in order to insure that all of the patents and patent rights owned by I. G. Farben as well as those owned by Jersey would be immediately available to all American companies. The action of the Custodian further insured that there would be no continuance of the illegal division of use of the patents between the oil and chemical fields.

In addition to the requirement for licensing the patents under the decree, the Custodian at present owns the patents originating with I. G. Farben, having seized them under a vesting order prior to the antitrust decree. The Custodian has stated that he proposed to disregard the exclusive license which I. G. Farben had origin-

[14] Cf. Thoms v. Sutherland, 52 F. (2d) 592 (C. C. A. 3d, 1931). In this case, the Alien Property Custodian sued the Eastman Kodak Co. for back dividends on a certain block of Eastman stock which the Custodian had seized. The defendant had issued the stock in 1903 to a German corporation as consideration for the German company entering into a contract with the defendant to run for 100 years. As part of the contract, the German company agreed not to manufacture or sell collodion papers in North American and certain European countries, and the defendant agreed not to manufacture or sell the same products in certain European countries. The defendant as a defense asserted that the stock had been illegally issued as consideration for a contract in restraint of trade. The court held that the contract was valid because the convenants referred to were incidental to a sale of the property. Consequently, the Custodian recovered. The court's decision on the antitrust point appears questionable. It should be noted that the action of the Custodian in this case resulted in an affirmance of the cartel arrangement.

ally granted Standard and to grant licenses himself. Ownership of the patents is at present in litigation with Standard, but the Court has sustained the Custodian's right to grant licenses during the litigation on terms consistent with the antitrust decree.[15] The action of the Custodian, in disregarding the oustanding exclusive licenses was, in this case, warranted by the provisions of the consent decree. Even without a decree, the Custodian may be in a position to follow a similar course with respect to patents subject to an illegal exclusive license.

Renegotiation of License Agreements

At the present time the Custodian is endeavoring to negotiate modifications of the license agreements affecting seized patents in order to terminate illegal provisions or provisions which effectuate cartel arrangements and to make possible the free licensing of the patents involved. Any such modifications must of course comply with the requirements of the antitrust laws and are scrutinized by the Antitrust Division of the Department of Justice.

If the relationship between the American company and the enemy firm is such as to make the renewal of illegal cartel arrangements likely, administrative action by the Custodian abrogating licensing agreements may not afford sufficient protection to the public interest. In such cases the Antitrust Division of the Department of Justice envisages the institution of litigation designed not merely to abrogate the illegal arrangements but also to provide for safeguards against their renewal.

An example of this type of situation is the pending *Merck* case.[16] The Merck Company of Rahway, New Jersey, had in 1932 entered into the so-called treaty agreement with E. Merck of Darmstadt, Germany, which allocates to each of the two companies the exclusive right to use the name of Merck in certain markets of the world. The Antitrust Division of the Department of Justice believes that this treaty was a cloak to conceal the territorial allocation of the business of the two firms. The Custodian has seized all of E. Merck's interest in the treaty, including certain patent rights and is therefore in a position to terminate the so-called treaty. He has not done so to date. Because of the close association of the two firms over a long period of time, and the nature of the evidence, the Government instituted proceedings seeking cancellation of the treaty and injunctive provisions against its renewal.[17]

CARTELS AND THE DISPOSITION OF VESTED PROPERTY

Cartels continue to create problems for the Custodian in connection with the sale or disposition of seized property. In disposing of the vested property, it is to be expected that the Custodian would wish to take measures to prevent vested property sold from being reacquired after the war by the former enemy owners, and to make

[15] Standard Oil Co. v. Markham, 57 F. Supp. 332 (S. D. N. Y. 1944).

[16] United States v. Merck & Co., Inc. (U. S. Dist. Ct. N. J. 1943).

[17] The defendant in its answer insisted that the Custodian was a necessary party to the litigation because he had vested patent rights belonging to the German concern which would be affected by the litigation. The Department of Justice does not believe that the Custodian is a necessary party. However, to expedite the litigation it has, with the Custodian's consent, moved to join him as a party plaintiff to the proceedings. This motion now awaits adjudication.

certain that the cartel relationship affecting the seized company did not survive his administration of the property.[18]

After the last war, the then Alien Property Custodian required purchasers to stipulate they would not resell the properties to German nationals. These stipulations proved ineffective. In a short period of time after the cessation of hostilities, the former owners had entered into cartel agreements with the purchasers which eventually gave the former owners control of the companies sold. A number of the properties seized by the Custodian during the present war were also seized by the Custodian during the First World War and were sold with the understanding that such properties would not again revert into German ownership.[19]

The Custodian, at the present time, proposes to sell the stock of the business enterprises seized in this war in small lots to private individual investors. The hope is that if the stock ownership in such companies is widely diffused among the American public, this will prevent reacquisition of the property by its former owners. If the seized company is sold without cancellation of the cartel agreements, however, it is apparent that after the war the cartel relationship between the seized company and the enemy owner may continue in effect despite the ownership of the domestic corporation by the United States during the war period. While the former German owner will not be able to claim any legal rights in the cartel contract unless the Custodian restores such rights, parties to a cartel who are desirous of continuing the relationship can readily reconstitute their contractual relationship. On the other hand, even if the Custodian should terminate such agreements by administrative action and resell the stock of the company to the American public in small lots, it is extremely doubtful whether these measures will be adequate to

[18] The cartel problem is here inextricably involved with the problem of ending enemy control. A restrictive agreement may be just as effective as stock ownership in securing control of a company's operations and even a share in the profits, and in the past both methods have been used. Particularly in cases where stock ownership was concealed through intermediaries and stock control therefore somewhat precarious, cartel agreements were entered into giving the German concern effective control over the domestic corporation's activities.

[19] After the First World War the properties of the Bayer Company, one of the predecessors of I. G. Farben, consisting of dyestuff and pharmaceutical factories, were sold by the Custodian to Sterling Products, Inc. Sterling resold the dyestuff factories to the Grasselli Chemical Company. By 1923 Sterling had entered into agreements with a predecessor of the I. G. Farben which gave the German company an interest in the profits derived by Sterling from the sale of aspirin, the chief Bayer products, in certain markets. Within a short time thereafter Sterling and I. G. Farben had agreed to conduct their business in the United States in ethical drugs through the medium of Winthrop Chemical Company, owned fifty percent by each. Winthrop agreed to refrain from exporting pharmaceuticals from the United States.

The Grasselli Chemical Company similarly entered into an arrangement with predecessors of the I. G. Farbenindustrie which led to the transfer of the dyestuff business formerly belonging to the Bayer Company to a new corporation, a predecessor of the General Aniline & Film Company, now one of the largest dyestuff manufacturers in the United States. General Aniline entered into an agreement with I. G. Farben providing that all of I. G. Farben's patents and processes in the field of dyestuffs and other commodities would be transferred to General Aniline for its use in the United States. General Aniline agreed to refrain from exporting dyestuffs and other commodities from the United States. Through the medium of these agreements, and holdings of stock through intermediaries, I. G. Farben regained control over General Aniline. The Custodian has vested substantially all of the stock of General Aniline, and all of the I. G. Farben interests in the contracts referred to. The validity of the agreements between General Aniline and I. G. Farben is now in litigation. United States v. General Aniline & Film Corporation (U. S. Dist. Ct. S. D. N. Y., 1941).

prevent the reacquisition of the properties, or the reestablishment of the cartel relationship. Even with the stock ownership widely distributed, control of the company may be bought up by the former owners after the war. Moreover, in many cases the seized company was dependent on the German cartel partner for its technology, and the cartel agreements have sheltered it from competition. There will, therefore, be strong pressures gravitating the seized company back into the German company's orbit either through the medium of a cartel arrangement or through stock ownership.

In many instances, the original acquisition of the domestic corporation by the enemy owner was in violation of the antitrust laws, and an injunction could therefore be secured against reacquisition. In cases where circumstances make such reacquisition or a revival of the cartel relationship likely after the war, it is believed that a court decree is required to guard against such a possibility. Administrative measures taken by the Custodian at the time of the sale of the seized companies may not be adequate for this purpose. For that matter it is also possible that decrees resulting from antitrust litigation may also prove inadequate to guard against the possibility of former owners reacquiring vested companies. The desirability of legislation banning such reacquisition should be explored.

This discussion has attempted to outline some of the difficulties which cartels have created. The problems involved are complicated and not easy of solution, but the objective is clearly recognized by both the Custodian and the Antitrust Division of the Department of Justice. The public policy underlying the antitrust laws and the war aims of the United Nations require that the cartel influence on seized property must be permanently eradicated.

SITUS PROBLEMS IN ENEMY PROPERTY MEASURES

ERNST RABEL*

It is difficult at the present stage of developments to discuss the problems in conflict of laws that will arise from the current war. The different measures that have been taken in various countries are largely provisional in character; future regulations are not easily predictable. There are, however, available to us certain general principles and experiences of the last war.[1] Those principles converge, verbally at least, around the situs of property. It is therefore largely toward that concept that the present discussion is directed.

I. THE SIGNIFICANCE OF SITUS

Lack of Uniformity in Treatment of Enemy Property

During the present war, enemy property has been treated separately by practically every one of the countries that are at war or have broken diplomatic relations with the Axis. Measures, such as seizures, freezing, compulsory administration and grant of licenses or sale, generally have a triple purpose. The state seeks to prevent the enemy from detrimental use of the funds involved, to avail itself of these funds for the promotion of war, and to secure satisfaction of claims against the enemy state or nationals. In nature, all these measures are provisional, having in view an eventual final settlement. In the case of sales of enemy property, the question of compensation is reserved. In this country, although title to property seized by the Alien Property Custodian is fully vested in him, he has declared that no step is being

* Dr. Jur., 1896, Vienna; Dr. Hon. C., Athens. Research Associate, University of Michigan. Formerly: Professor of Law in the Universities of Leipzig, Basle, Kiel, Goettingen, Munich, and Berlin; Director of the Institute for Foreign and International Private Law; Member of the Council and the Executive Committee of the International Institute for the Unification of Private Law in Rome; Judge of Swiss and German courts, the Germano-Italian Mixed Arbitral Tribunal, and the World Court.

[1] Part X of the Treaty of Versailles was devoted to economic clauses. See SEN. Doc. No. 348, 67th Cong., 4th Sess. (1923) 3445 *et seq.* (document entitled "Treaties, Conventions, International Acts, Protocols, and Agreements between the United States of America and other Powers," being Volume III of a governmental compilation of such Acts, and hereinafter cited as "III TREATIES."

A comprehensive literature exists on the ramifications of this tenth part of the Treaty of Versailles: SIMONSON, PRIVATE PROPERTY AND RIGHTS IN ENEMY COUNTRIES (1921); GIDEL ET BARRAULT, LE TRAITÉ DE PAIX AVEC L'ALLEMAGNE ET LES INTÉRETS PRIVÉS (1921); SCOBELL ARMSTRONG, WAR AND TREATY LEGISLATION 1914-1922 (2d ed.); HERMANN ISAY, DIE PRIVATEN RECHTE UND INTERESSEN IM FRIEDENSVERTRAG (3d ed., 1923); SAUSER-HALL, LES TRAITÉS DE PAIX ET LES DROITS PRIVÉS DES NEUTRES (1924); Richard Fuchs, *Die Grundsätze des Versailler Vertrages über die Liquidation und Beschlagnahme deutschen Privatvermögens im Auslande* (1927) 6 RECHTSVERFOLGUNG IM INTERNATIONALEN VERKEHR, part II (ed. by Leske and Loewenfeld); De Solere, *Conditions des Biens Ennemis*, 4 RÉPERTOIRE DE DROIT INTERNATIONALE (De Lapradelle et Niboyet, 1929).

undertaken that may interfere with the ultimate disposition pursuant to the policy to be determined by Congress.[2]

During the first World War the situation was analogous. The final regulation in the peace treaties with the Central Powers maintained the principle (with a few qualifications) that every Allied or associated country should be entitled separately to liquidate enemy property in its territory, although this particular phase of the regulation was not emphasized in the fundamental text of Article 297(b) of the Treaty of Versailles. This article was to the effect that "the Allied and Associated Powers reserve the right to retain and liquidate all property, rights and interests belonging at the date of the coming into force of the present Treaty to German nationals, or companies controlled by them, within their territories, colonies, possessions and protectorates, including territories ceded to them by the present Treaty."[3]

Territory acquired by an Allied state subsequent to the effective date of the Versailles Treaty (January 10, 1920) under another of the "Paris suburb treaties" was not included, nor did the right of liquidation extend to property situated in the vanquished countries.[4] The provisional war measures, including those taken by the Central Powers, were ratified (art. 297) but the defeated countries had to compensate the nationals of the victorious states as well as their own nationals, who, by the force of circumstances, received but a minimal indemnification.

What system will prevail after the present conflagration is unknown, but some of the discussions published thus far seem to indicate that whatever burdens will be imposed on German private property in Germany, it will not be subject to technical liquidation as enemy property. The same territorial distinction that was made after the last war seems to be primordial. Indeed, the outline of this distinction is already being shaped by the evident difference of policies under which German foreign investments and the population of occupied portions of Germany are being treated.

It is entirely unknown, however, to what extent the United States will retain the property seized. Looking back to the eventful history of Congressional Acts and activities of the Alien Property Custodians from 1917 to 1934 and remembering searching discussions of principles and ideals involved,[5] we may imagine many possibilities. Nor is there any visible hint whether this time each Allied country by itself will again be entitled to adopt independent provisions for the disposition of enemy property or whether some pool will be formed, as certain proposals seem to have suggested.

[2] Crowley, *Statement Concerning Enemy Held Patents and Trademarks* (1942) 32 TRADE MARK REP. 66, 69.

[3] Correspondingly, see Art. 249 of Treaty of St. Germain, III TREATIES, *supra* note 1, at 3242; Art. 232 of Treaty of Trianon, *id.* at 3636. Also, Art. 177 of Treaty of Neuilly.

[4] See the initial paragraph of Art. 297, Treaty of Versailles, III TREATIES, *supra* note 1, at 3462; Temperley, 5 HISTORY OF THE PEACE CONFERENCE OF PARIS (1921) 89; GIDEL ET BARRAULT, *op. cit. supra* note 1, at p. 55; Stamm & Cie. v. Henning (Anglo-German Mixed Arbitral Tribunal, Dec. 6, 1923) 2 RECUEIL DES DÉCISIONS DES TRIBUNAUX ARBITRAUX MIXTES 875 (hereinafter cited as "RECUEIL").

[5] See GATHINGS, INTERNATIONAL LAW AND AMERICAN TREATMENT OF ALIEN PROPERTY (1940) with Introduction by Borchard; Borchard, *Nationalization of Enemy Patents* (1943) 37 AM. J. INT. L. 92.

Extensive Coverage of Existing Measures

There is also another reason that the present war decrees concerning enemy property do not afford a good basis for an analysis of the eventual personal or territorial limitations. Broad as were the similar economic warfare measures in the last war, they have been greatly surpassed in this. The previous Trading with the Enemy Acts and related regulations have been extended and their gaps circumspectly filled in view of the huge interests involved, the enormous increase of industrial war supply and the extreme resourcefulness and ruthlessness of the aggressors. Thus, the "freezing" orders and the use of alien patents in this country include assets of the nationals of Axis-subjugated countries; presumably these measures are to be withdrawn as soon as possible. The countries that have shifted their alliance to the United Nations present another problem. But even insofar as only the war with Germany and Japan is concerned, the concept of "enemy" or "national" of enemy countries has been defined on both sides in the broadest manner. It includes individuals of enemy nationality, domiciliaries of enemy countries, the corporations and other organizations constituted in these countries, having their principal place there, or in any way "controlled" by enemies, control being presumed in various situations.[6] All three criteria used by competitive theories to designate the connection of a corporation with a country—incorporation, domicil (seat), and control—have been coordinated, any one sufficing to impress the character of enemy upon a corporation.

This applies to neutral individuals and organized bodies as well as to citizens of Allied countries and corporations organized in Allied countries, and naturally produces overlapping grounds of seizure by the several countries. That the various Allied alien property custodians have devised a scheme for dividing their files has not been revealed. On the contrary, not even Great Britain and the Dominions seem to have arranged an understanding. An informative book of 1943 states that conflicting claims do arise, as when Canadian shares, endorsed in blank for transfer, are physically situated in an English bank, to the order of a trustee in South Africa, under a trust with an enemy beneficiary. "All three custodians may claim the shares, and the asset will probably be reported in each of the countries."[7]

In the period following the last war, a few interallied agreements and also some arrangements with the enemy offices were reached, supplemented by the rulings of the Mixed Arbitral Tribunals. However, for delimiting the exercise of the right of liquidation, the only established basis was the territorial distinction of all property according to its location.

The Force of Territorialism

The principle of territorialism, granting a state exclusive sovereign power over a part of the earth's surface, is so firmly rooted in the forceful traditions of international

[6] As to freezing regulations, see Note, *Foreign Funds Control Through Presidential Freezing Orders* (1941) 41 COL. L. REV. 1039, 1045; as to trading with the enemy generally, see DOMKE, TRADING WITH THE ENEMY IN WORLD WAR II (1943) *passim*.

[7] F. C. HOWARD, TRADING WITH THE ENEMY (London, 1943) 83.

law that it will again prevail in some form as a matter of course after this war in the relations among the allied countries, between them and the enemy countries, and in the relationship towards the neutrals.

Mr. Justice Brandeis, speaking for the Supreme Court of the United States in the case of an undemanded bank deposit seized by the State of California under its statute on escheat, pointed out[8] that under the Court's decisions, the proceedings for escheat,[9] as well as for confiscation,[10] forfeiture,[11] condemnation[12] and similar matters, are not "in personam" but "in rem." In a recent case of escheat, the Supreme Court explained that it does not matter so much whether the proceedings are called in rem or quasi in rem; what matters is that the obligation of a bank to pay in accordance with the terms of the deposit is a part of the mass of property subject to state control, wherefore due process of law is satisfied with fair notice and opportunity to the possible owner to be heard.[13]

The recent comprehensive discussions in this country devoted to the extraterritorial effect of the Soviet nationalization decrees[14] and of the German exchange restrictions,[15] testify anew to the persistence of the principle in its several aspects.

On the one hand, it is an often repeated thesis that "the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."[16] As the State Department reminded an American citizen complaining about the interference of the German "transfer" prohibitions with his investment: "Investments or funds within the jurisdiction of a foreign country are subject to the laws of that country. In the absence of specific treaty provisions to the contrary, there is no way in which a private person may secure immunity from the local law for his investments or property held within the jurisdiction of a particular state."[17]

Thus, the confiscatory Soviet decrees have been finally recognized in almost all countries to the extent that they affect the property situated in the Soviet territory.[18]

[8] *See* Security Savings Bank v. State of California, 263 U. S. 282, 287 (1923).

[9] Christiansen v. King County, 239 U. S. 356 (1915).

[10] Act of Congress of July 17, 1862, §§5-7, 13 STAT. 272; The Confiscation Cases, 20 Wall. 92 (U. S. 1873).

[11] Friedenstein v. United States, 125 U. S. 224 (1888).

[12] Huling v. Kaw Valley Ry., 130 U. S. 559 (1889).

[13] Anderson Nat. Bank v. Luckett, 321 U. S. 233 (1944).

[14] Borchard, *Extraterritorial Confiscations* (1942) 36 AM. J. INT L. 275, 276 n. 9; Jessup, *The Litvinov Assignment and the Pink Case, id.* at 282, 285; Gilligan, *Extraterritorial Effect of Foreign Decrees and Seizures* (1940) 88 U. OF PA. L. REV. 983, 988; Note, *Protective Expropriatory Decrees of the Governments in Exile* (1941) 41 COL. L. REV. 1072, 1077.

[15] Freutel, *Exchange Control, Freezing Orders and the Conflict of Laws* (1942) 56 HARV. L. REV. 30; DOMKE, *op. cit. supra* note 6, at 314 ff.

[16] Underhill v. Hernandez, 168 U. S. 250 (1897); Polydore v. Prince, Fed. Cas. No. 11257 (D. Me. 1837).

[17] 2 HACKWORTH, DIGEST OF INTERNATIONAL LAW (1941) 71; cf. Holzer v. Deutsche Reichsbahn-Gesellschaft, 277 N. Y. 474, 14 N. E. (2d) 798 (1938); Branderbit v. Hamburg-America Line, 31 N. Y. S. (2d) 588 (Sup. Ct. 2d Dept. 1941).

[18] Salimoff & Co. v. Standard Oil Co. of New York, 262 N. Y. 220, 186 N. E. 679 (1933); Vladikovkazsky Ry. Co. v. New York Trust Co., 263 N. Y. 369, 189 N. E. 456 (1934). England: (on condition of recognition of the foreign government by the government of the forum) Luther v. Sagor [1921] 1 K. B. 456, *rev'd* after the recognition [1921] 3 K. B. 532; CHESHIRE, PRIVATE INTERNATIONAL LAW (2d ed. 1938) 151. The European courts have finally recognized that branches of nationalized Russian corporations have been dissolved.

On the other hand, American courts,[19] like all others,[20] have consistently refused to give effect to foreign confiscations in application to property situated in the forum or even a third country. The forum's public policy, obviously is also reflected in this rule. Guided by international treaties, it may work in opposite directions in the two types of cases and is the strongest component factor in the matter of forcible seizures.

Interplay of Territorialism and Public Policy

For recognizing a belligerent's confiscatory seizures beyond its territory, a specific reason is needed. The Versailles Treaty was ratified and published as internal law by Germany and was thereby binding. Conversely, economic war implies the absence of any recognition whatever of seizures by enemies or neutrals, so long as the war lasts. Thus, the two periods pending and after the war are sharply distinguishable.

During wartime, as is the case at the present writing, the one-sided hostile seizures by a belligerent are, naturally, repudiated by the foe. Moreover, from 1914 to 1918 refusal of recognition of such acts could be based on a principle of international law that was not even questioned, at least not on the European Continent. An American federal court hardly needed to argue that American law should apply to a partnership between an American and a German partner carrying on business in the United States in order to reach the result that the common law rule annulling the contract should apply and that a German court decree inimical to the American partner should be refused recognition.[21] Whatever the applicable law, a German hostile measure was ineffective in this country, if in fact such was the nature of the appointment of a "Pfleger" (absence trustee); if, on the other hand, it was merely conservative, for the protection of the American partner, recognition was due.[22] The German Supreme Court concluded, even after the effective date of the Peace Treaty, that English and French seizures during the war, contrary to international law, could not excuse non-payment of a debt or non-restitution of property to the person

[19] In recent years: Weber v. Johnson, 15 N. Y. S. (2d) 770 (Sup. Ct. N. Y. County, 1939); Anninger v. Hohenberg (1939) 172 Misc. 1046, 18 N. Y. S. (2d) 499 (1939). The hope has been expressed that the doctrine of Pink v. United States, 315 U. S. 203 (1942) may be confined to the scope of the Litvinov Agreement: Borchard, *supra* note 14; Jessup, *supra* note 14; Note (1942) 51 YALE L. J. 848; LAUTERPACHT, ANNUAL DIGEST AND REPORTS OF PUBLIC INTERNATIONAL LAW CASES 1938-1942 (1942) 141, 150.

[20] England: The Jupiter No. 3 [1927] P. D. 122, *aff'd* [1927] P. D. 250; Banco de Vizcaya v. Don Alfonso de Borbon y Austria [1935] 1 K. B. 140; The El Condado, 63 L. L. L. R. 330 (Scot. Ct. of Sessions, 1939).

France: Société Potasas Ibericas v. Bloch, Cass.-civ., March 14, 1939, 34 REV. CRIT. DE DR. INT. PRIVÉ (1939) 280, 6 NOUV. REV. DE DR. INT. (1939) 163 and precedents cited in the notes thereto.

Germany: Reichsgericht cases reported in 60 ENTSCHEIDUNGEN DES REICHSGERICHTS IN ZIVILSACHEN (hereinafter cited as RGZ.) 300; 63 *id.* 93, 183; 106 *id.* 83; 110 *id.* 173; 119 *id.* 259, etc.

[21] Mayer v. Garvan, 278 Fed. 27 (C. C. A. 1st, 1922), fundamentally criticized by Anderson, dissenting.

[22] Hennequin v. German Gov't, Franco-German Mixed Arb. Trib., July 13, 1922, 2 RECUEIL, *supra* note 4, at 305; L. Weil v. German Gov't, same, Dec. 11, 1922, 2 *id.* at 771. In another case before the same tribunal the German measure was qualified as a war supervision. Decision of May 13, 1922, 2 *id.* at 116.

originally entitled thereto and that the resulting default continued to be legally significant.[23]

Neutrals likewise normally withold any recognition to exceptional war measures for the double reason that public law is inapplicable in a foreign court and that foreign measures implementing war "in the economic or any other domain" must be disregarded.[24] This attitude is in harmony with general principles. Penal and political, as well as confiscatory, foreign laws and decrees are traditionally refused recognition. Deprivation of property without due process of law and just compensation is considered contrary to international law, as well, generally, as to the fundamental conceptions of the forum. A more flexible approach, however, has been adopted toward such matters as annulment of gold clauses and prohibition of certain money payments, especially when a court has seen that its own legislature has been compelled or was likely to resort to measures similar to those previously held repugnant to basic institutions. Nevertheless, German courts rejected Hungarian debtors' excuse based on the ground of Hungarian transfer restrictions,[25] and the Swiss Federal Tribunal continued to deny to German exchange legislation any extraterritorial effect,[26] on the ground that these measures formed part of an economic belligerence, protecting domestic and discriminating against foreign interests. This view, which has been advocated in this country,[27] seems much more satisfactory than a third rationale, to the effect that the debtor is responsible for not being able to pay, since his own state has caused his inability; he should bear the risk of damage occasioned by such legislation while he enjoys the benefits procured by the national economy of which he is a part.[28] However this may be, evidently the facts and their relation to the forum ought to be carefully investigated before "public policy" is invoked to refuse recognition. Thus, it would follow that war measures of an allied country, aiming at the same goal, are to be sustained to the extent that they are not harmful to the forum's own war policy. This is what has resulted, though on an insecure basis, in the cases maintaining the decree of the

[23] Reichsgericht, September 22, 1930, 130 RGZ. 23, 30. See also the decision of June 13, 1934, 145 RGZ. 16 at 19.

[24] Compagnie Universelle de Télégraphie et de Téléphone Sans Fil v. United Service Corp., 84 N. J. Eq. 604, 95 Atl. 187 (1915); Swiss Fed. Trib. decision of Dec. 17, 1914, 40 ENTSCHEIDUNGEN DES BUNDESGERICHTS (hereinafter cited as BGE.) I, 483 (French decree preventing a French insurance company to accept premium payment by enemy). Accord, Swiss Fed. Trib., April 17, 1916, 42 *id.* II, 179, (1917) REV. DR. INT. PRIVÉ 348, Journal Clunet, 1917, 306; Trib. Monaco, May 24, 1917, Journal Clunet, 1917, 1508, (1917) REV. DR. INT. PRIVÉ 602 (French prohibition of payment); Trib. Genève, Nov. 30, 1917, Journal Clunet, 1918, 765, (1918) REV. DR. INT. PRIVÉ 190 (German sequestration in occupied Russian Poland).

[25] Kammergericht, Oct. 27, 1932, (1932) JUR. WOCH. 3773; Landgericht Berlin I, Feb. 19, 1932, (1932) JUR. WOCH. 2306.

[26] 60 BGE. II, 294, 310; 61 *id.* 242, 246; 62 II *id.* 108. The rejection extends to the case where the debt is governed by German law, see decision of March 2, 1937, 63 *id.* II 42, PRAXIS D. BG. (1937) 115.

[27] Freutel, *supra* note 15, at 58.

[28] 2 RAAPE, DEUTSCHES INTERNATIONALEN PRIVATRECHT (1939) 315, 321, approving position taken by KOEPPEL, DIE DEUTSCHE DEVISENGESETZGEBUNG IM INTERNATIONALEN PRIVATRECHT (1938) (not available to the writer).

Netherlands that vested Dutch private property in the Crown,[29] and (in England) sanctioning requisition of vessels by the Norwegian government.[30]

But do foreign prohibitions of disposition such as are included in the Trading with the Enemy Acts never excuse a debtor? It is noteworthy that not only the Dutch courts but also the German Reichsgericht[31] accepted the justification of non-performance factually caused by the obstacles in the English Trading with the Enemy Act, correctly in the present writer's opinion, though contrary to the courts of many other jurisdictions.

Territorial Limitations Despite Treaty

Having accepted the peace treaty, the vanquished countries had to recognize all seizures and ensuing liquidations in the adversary countries. The territorial limits, however, remained. The victor was entitled only to take property within its territory. For instance, the authority of an alien property trustee was restricted to his territory, a phenomenon familiar to the common law. A law suit won in an English court against a German debtor nominally represented by the trustee, could not have the effect of *res judicata* against the debtor as respects the latter's property situated in Germany[32]

The principle governing relations between neutral countries and the parties to any international treaty is very clearly settled. With regard to third states a treaty is *res inter alios acta;* "a treaty creates law only between the States being parties to it."[33] There are, however, exceptions to the principle, and among them is the case where a third state, according to its own conflicts rules, has to apply the law of one of the states participating in the treaty and incorporating it into its law. In this sense, in the Netherlands, Switzerland, Luxemburg,[34] and possibly elsewhere,

[29] Anderson v. N. V. Transadine Handelsmaatschappij, 289 N. Y. 9, 43 N. E. (2d) 502 (1942); see for other cases 65 N. Y. STATE BAR ASS'N REP. (1942) 275.

[30] Lorentzen v. Lydden & Co. [1942] 2 K. B. 202. On an analogous Swedish decision see Jessup, *supra* note 14, at 287 n. 19.

[31] The Netherlands: Trib. Rotterdam, Oct. 5, 1916, reported in VAN HASSELT, DE NEDERLANDSCHE RECHTSPRAAK BETR. INT. PRIVATRECHT (1936) 143; also, other decisions therein cited at 141.

Germany: Reichsgericht, June 28, 1918, 93 RGZ. 182 (English company in Buenos Aires excused from non-delivery of goods).

[32] Stamm & Cie v. Henning, Anglo-German Mixed Arb. Trib., 2 RECUEIL, *supra* note 4, at 875; Brixhe and Deblon v. Agrippina, German-Belg. Mixed Arb. Trib., March 31, 1922, 2 *id.* 7; Peeters, van Haute et Duyver v. Trommer et Grüber (same trib.) 2 *id.* at 384. This was not understood by the App. Brussels, July 15, 1921, 1 *id.* at 713, where the appointment of a custodian by the Court of Sessions in Edinburgh was held good for standing in court in Belgium, because "English" law governed the contract.

[33] Judgment No. 7, May 25, 1925, P. C. I. J., Ser. A No. 7, p. 29; ANZILOTTI, COURS DE DROIT INTERNATIONAL (1929) 414.

[34] Peace treaty provisions have been applied under this theory in the Netherlands: Deutsche Bank v. Zirini, Trib. s'Gravenhage, Feb. 7, 1922, WEEKBLAAD 11010, *aff'd*, Appel s'Gravenhage, Nov. 30, 1922, WEEKBLAAD 11094, *re-aff'd*, Hooge Raad, Jan. 10, 1924, WEEKBLAAD 11161, WILLIAMS AND LAUTERPACHT, ANNUAL DIGEST OF PUBLIC INTERNATIONAL LAW CASES, 1919-1922 (1932) 324, case No. 235; dec. of March 13, 1928, Court of Appeal, Amsterdam, WEEKBLAAD 11816, MCNAIR AND LAUTERPACHT, ANNUAL DIGEST OF PUBLIC INTERNATIONAL LAW CASES, 1927-1928 (1932) 414, case No. 285. The related rule that the Peace Treaty is not applied when the law of the forum governs appears in the decision of the Swiss Federal Tribunal, *infra* n. 35. Likewise the Court of Appeals of Luxembourg, May 29, 1925, Journal Clunet, 1929, 472, 476. Cf. Chailley, in RÉPERTOIRE DE DROIT INTERNATIONAL (De Lapradelle et Niboyet) SUPP. (1934) 324, No. 168.

the tenth part of the Versailles Treaty has been given effect so as to modify private rights and obligations existing between the subjects of former enemy states.

The Swiss Federal Tribunal has declared its position in two cases, both denying the application of the Versailles Treaty despite the fact that both parties belonged to states bound thereby. "Since Switzerland is not a party to the Peace Treaty of Versailles, its provisions have no force of law in our territory."[35] In the first case the insurance contract on which the action was based was governed by Swiss law by virtue of a stipulation as well as the Swiss place of performance; the second concerned a problem of Swiss judicial jurisdiction, which, pertaining to Swiss public law, could not be altered by any event connected with French war seizures or administration.

A distinguished Swiss author, writing after the first of these decisions, has insisted on the bilateral character of the treaty provisions. By the consent of the vanquished nations, the war measures should have been accorded international recognition, even by the neutral states. They should not be applied in the latter, however, to the extent that they offend the public policy of the forum or seek to control property situated in the territory or legal relationships governed, under the private international law of the neutral court, by the law of the forum.[36] This formula, less cautious than the language of the Swiss Federal Court in acknowledging the modifications worked by the peace treaties on private law relations, may yet fairly describe the actual position of the neutrals.

It cannot be expected that those states which neither participate in the eventual treaties nor, by a formal act of recognition, join in their enforcement, will agree to any and all measures affecting property situated in their own territories. That this alone causes some substantial problems will be illustrated hereafter. In view of the many difficulties that will arise on the termination of the present cataclysm a fair understanding with the neutral powers would be highly desirable.

II. THE SITUS OF SIMPLE DEBTS

Although it is frequently asserted that debts not embodied in an instrument have no situs, the necessity of localizing them under traditional analyses is evident in many fields, such as taxation, involuntary assignment (a class including war seizures and liquidations), jurisdiction for litigation, death duties, grant of probate and administration of estates. These purposes require differentiated treatment. The criteria of localization, too, are differently selected in the various countries. Nevertheless, there exists a natural temptation in discussing one subject to look for analogies in another, particularly so in the matter of war measures which enjoy very little judicial authority, since the victorious powers have generally excluded enemy aliens from relief in the courts on account of property seizures. The most popular resort is that made to jurisdiction for garnishment. Seizures are compared with

[35] Bundesgericht, November 4, 1920, 46 BGE. II 421, at 423; same trib. December 11, 1925, 51 *id.* I 417, at 420.

[36] SAUSER-HALL, *op. cit. supra* note 1, at 41, 43.

the order prohibiting the garnishee to pay his original creditor, and liquidation is comparable to the order divesting the original creditor of his right and transferring it to the garnishor.

Analogies from Systems of Conflicts Rules in Garnishment

The procedural rules regulating garnishment are too diverse to be discussed here. With respect to the jurisdiction for the final expropriating decree, three systems may be distinguished.

(a) In France,[37] Germany[38] and most other Continental countries, garnishment (saisie-arrêt, Forderungspfaendung) has to be sought at the domicil of the debtor's debtor. The French Court of Cassation takes the exclusive nature of jurisdiction at that place so seriously that French courts have been declared without jurisdiction against a garnishee domiciled abroad, just as in a case of seizure against other property situated abroad.[39] Under this French private international law rule, Alsatian courts, assuming jurisdiction at the domicil of the garnishee, have applied their own local civil procedure differing from the French.[40]

The German doctrine rests on the broadest imaginable generalization of Section 23 of the Code of Civil Procedure, whereby, for the purpose of jurisdiction in a personal action, a debt is situated at the debtor's domicil. If the garnishee is domiciled abroad, the German courts will grant garnishment at the domicil of the principal debtor within the forum, but the Supreme Court has confirmed the view that the garnishee must be given service of process at his own domicil and that the efficacy of the grant therefore depends on the readiness of the foreign state.[41] It is well known that neighboring states refuse such cooperation.[42]

That the domicil of the garnishee is selected is commonly justified by the double advantage that this place is ascertainable with relative ease and that, in the development of the old maxim, *actor sequitur forum rei,* a debtor may be sued at his domicil even though he is absent and there are other, non-exclusive, jurisdictions. His assets are deemed to be concentrated there. On this basis, the place where the debt is to be paid appears immaterial. Procedural steps are taken to safeguard the interests of the original debtor, but the proceedings are centered in the suit against the garnishee.

(b) The common law system may become essentially similar under very common statutes, universally held valid, permitting personal jurisdiction of the debtor through service of process at his residence even though he cannot be found there. Originally, indeed, as Beale has demonstrated, the custom of London regarded garnish-

[37] GLASSON, MOREL ET TISSIER, 4 TRAITÉ DE PROCÉDURE CIVILE (3d ed. 1925-36) No. 1166 bis; LEREBOURS-PIGEONNIÈRE, PRÉCIS DE DROIT INTERNATIONAL PRIVÉ (3d ed. 1937) 344, No. 299; cf. *id.* at 433, No. 357.

[38] Reichsgericht, Oct. 12, 1895, 36 RGZ. 355; same, May 16, 1933, 140 *id.* 340; same, June 18, 1907, 63 SEUFFERTS ARCHIV, p. 41, No. 27.

[39] Cass.-civ, May 12, 1931, Sirey, 1932, I 137, Dalloz Jur., 1933, I 60.

[40] GLASSON, MOREL ET TISSIER, *supra* note 37, at No. 1166; *adde* Koechlin v. Risso, App. Colmar, March 23, 1938, 19 REV. JURID. D'ALSACE ET DE LORR. 588.

[41] (1933) 140 RGZ. at 343.

[42] SCHNITZER, HANDBUCH DES INTERNATIONALEN PRIVATRECHTS (1937) 338.

ment proceedings as directed *in rem* against a debt due in London by a debtor domiciled at the forum.[43] It should be noted that modern English courts, although analyzing the situation of simple debts in terms of personal jurisdiction at the place where it is "properly recoverable," nevertheless do consider various circumstances. Thus, Lord Scrutton in a leading case pointed out that the debt arose in London and that the original debtor appeared in the law suit and submitted to the jurisdiction, obtaining a benefit thereby. He thought that any foreign country would recognize such jurisdiction.[44] As it seems, a normal residence of the garnishee is generally presupposed,[45] and a mere temporary sojourn of the garnishee would perhaps not suffice in England. But in the United States, the courts in overwhelming majority[46] have construed the proceedings as directed against a debt located for jurisdictional purposes wherever the garnishee could validly be served with process. So to speak, the debt is where the garnishee may be sued personally by his creditor. The Supreme Court of the United States, approving this view, has stated that, under the full faith and credit clause, any other state has to recognize the double effect of the proceedings divesting the original debtor and investing the garnishor.[47]

The fact that in several states domicil does determine jurisdiction, and that this seems to enjoy interstate effect if fair notice is given to the debtor,[48] serves only to increase the number of jurisdictions having power to dispose of the debt. The writers have noticed the inconvenience to the original debtor in being compelled at his peril to appear in any court of the world where his alleged creditor happens to sue his alleged debtor. By the effect of their procedural institutions, the inconveniences of being cited to come to the garnishee's domicil are not so great and dangerous in the Continental system. Another danger is that the garnishee may be compelled to pay the same debt once again in a foreign country where the American garnishment does not produce *res judicata*. To obviate this, some English and American decisions have denied the garnishment order if the danger is convincingly proved.[49] Much criticism by the writers of the entire mechanism of this institution has been noteworthy.[50]

(c) In certain legislative systems, it is apparently essential that not only the garnishee but in addition either the garnishor or the latter's debtor should be

[43] Beale, *The Exercise of Jurisdiction in Rem to Compel Payment of a Debt* (1913) 27 HARV. L. REV. 107; 1 BEALE, CONFLICTS (1935) §108.2, p. 460 ff.

[44] *See* Swiss Bank Corp. v. Boehmische Industrial Bank [1923] 1 K. B. 673, 682.

[45] *See* Lord Atkin, in New York Life Ins. Co. v. Public Trustee [1924] 2 Ch. D. 101, 119: ". . . domicile where the creditor could enforce the debt."

[46] For the exceptions see STUMBERG, CONFLICT OF LAW (1937) 101.

[47] Harris v. Balk, 198 U. S. 275 (1905); Louisville and Nashville R. R. v. Deer, 200 U. S. 176 (1906); Baltimore and Ohio R. R. v. Hostetter, 240 U. S. 620 (1915); RESTATEMENT, CONFLICTS OF LAWS (1934) §108.

[48] *See* Mr. Justice Holmes in McDonald v. Mabee, 243 U. S. 90 (1917) and comment by STUMBERG, CONFLICT OF LAW (1937) 76.

[49] Parker, Peebles & Knox v. National Fire Ins. Co., 111 Conn. 383, 150 Atl. 313 (1930); Note (1930) 40 YALE L. J. 139.

[50] Beale, in 27 HARV. L. REV. *supra* note 43, at 120; GOODRICH, CONFLICT OF LAWS (2d ed. 1938) §68; NUSSBAUM, PRINCIPLES OF PRIVATE INTERNATIONAL LAW (1943) 207.

domiciled in the forum.[51] The Swiss courts consider a debt situated at the place of the creditor's domicil; if, however, this place is abroad, the debt may be attached, and as it seems, also garnished at the Swiss domicil of the debtor.[52]

Among these systems, none of them flawless, evidently only the first, in its rigid French application, serves the convenience of international harmony. International recognition for the jurisdiction of the garnishee's domicil has been already postulated.[53] French authors have broadened the idea that in international relations a debt is to be localized at the domicil of the debtor since he is the person who is to furnish the subject matter of the enforcement.[54] This French doctrine is very firm[55] and probably has strongly influenced the ideas in the background of the Versailles Treaty.

Doctrine and Application Under Treaty

Under the Peace Treaties of 1919 a few voices advocated the domicil of the creditor or the place where a debt ought to be performed,[56] or a cumulation of requirements.[57] However, practical convenience in this case so evidently favored the domicil of the debtor that it was adopted in England,[58] France, Germany, Switzerland,[59] and probably elsewhere. To illustrate: late in 1918 the Brussels branch of a German bank sent a check of a German customer for collection to a Belgian bank at another place. After this bank collected the check and credited it to the Brussels branch, the Belgian government seized the credit. The German Supreme Court recognized that Belgium correctly liquidated the debt of the second bank due to the branch and concluded that the customer could not require payment of the proceeds.[60]

Thus, liquidation depended on the domicil of the debtor within the country and enemy nationality of the creditor at the decisive time. A debt of a French dom-

[51] This seems to be the Dutch system. See VAN HASSELT, *op. cit. supra* note 31, at 474. But in the absence of more literature available it does not seem clear whether the decision of the Hooge Raad, January 20, 1939, WEEKBLAAD 569, regarding attachment of a foreigner's assets, does not imply some broader rules concerning garnishment.

[52] Swiss Fed. Trib., 31 BGE. I 210, 521; 32 *id.* I 814; 47 *id.* III 75; 56 *id.* III 50, 230; SCHNITZER, *op. cit. supra* note 42, at 338.

[53] *See* Rheinstein in (1934) 8 ZEITSCHRIFT FÜR AUSLANDISCHES UND INTERNATIONALES PRIVATRECHT 277.

[54] ANDRÉ WEISS, 4 TRAITÉ DE DROIT INTERNATIONAL PRIVÉ (1912) 430-3; SAUSER-HALL, *op. cit. supra* note 1, at 80 n. 1, citing ALEX. WAHL, LE RÉGIME FISCAL DES SOCIÉTÉS ET DES VALEURS ETRANGÈRES.

[55] I remember that André Weiss orally professed this doctrine as perfectly settled.

[56] See citations in Fuchs, *supra* note 1, at 117.

[57] According to RAAPE, *op. cit. supra* note 28, at 284, either the state of the creditor or that of the debtor has power to seize the debt.

[58] New York Life v. Public Trustee [1924] 2 Ch. D. 101. See also *In re* Queensland Mercantile & Agency Co. [1891] 1 Ch. 536, *aff'd* [1892] 1 Ch. 219, applying Scottish law to the question of priorities between two conflicting assignments of a claim, since the debtors were resident in Scotland.

[59] France: Circular letter of the French Prime Minister of December 11, 1918, on the sequestration of enemy property in Alsace-Lorraine, sub. II. Cf. the Decree of February 28, 1916, art. 2 (2) on the declaration of debts at the domicil of the debtor.

Germany: Reichsgericht, June 2, 1923, 107 RGZ. 44, 46; same trib., May 2, 1924, 108 *id.* 265, 267; same trib., March 18, 1931, 132 *id.* 128.

Switzerland: SAUSER-HALL, *op. cit. supra* note 1, at 80.

[60] Reichsgericht, April 5, 1924, (1924) 29 DEUTSCHE JURISTENZEITUNG, col. 828.

iciliary due a German domiciled in England was, therefore, subject to liquidation only in France.

It was also concluded therefrom that a Swiss domiciled in France validly discharged his debt to a German creditor by payment to the French custodian office, whereas a debt of a Swiss domiciled outside of France due to a German domiciled in France was not susceptible of liquidation.[61] Allied custodians, however, did not always feel bound to the latter restriction. In one case, the French sequestrator wrote a letter to a Danish bank which never had a French branch to pay to him a sum of Danish crowns representing the amount to the credit of a partnership carried on by Germans in France and now in liquidation under French war measures. The bank obliged by sending 22,000 crowns. The German Supreme Court held that the bank should not have obeyed and should pay over to the original creditors.[62]

Disowning this entire conception, the Nationalist-Socialist confiscatory decrees sought to take over the claims of the victims against foreign debtors, a pretension rejected by American courts on the ground that a debt owed by a New York corporation to the firm affected by a confiscation was a property in New York and could not be reached by the acts, decrees or laws of the German government.[63]

Complications Arising from Business Branches

Some applications of the principle caused difficulties and discussions familiar in the cases of garnishment were recalled, for example, when the danger of double liability arose in a claim of the custodian or of the original creditor.

Outstanding was the problem of debts arising from engagements entered into by the branch office of a foreign business organization. When a German debtor had no branch in Belgium, he certainly could not escape an action by his creditor seeking to secure satisfaction out of his German assets, although he had assets in Belgium seized by the Belgian authorities.[64] In other words, the internal instructions of the liquidating state were in conformity with the Treaty if they assigned marshalling privileges only to debts secured by local assets. The problem arose whether the same principle should apply to branches.[65]

No doubt it is in the nature of a branch, as contrasted with a subsidiary corporation or agency, to form, in legal conception, an integral part of the enterprise. Ordinarily, a debt contracted by a branch in its course of business may be enforced by suing the principal establishment. But there are exceptions to this in peace

[61] SAUSER-HALL, *op. cit. supra* note 1, at 80. An erroneous argument for extending the scope of liquidations was sometimes adduced from the apparently broad language of §2 of the annex to Arts. 297-298 of the Versailles Treaty. In the dominant opinion Art. 297(b) was decisive.

[62] Reichsgericht, June 13, 1934, 145 RGZ. 16.

[63] See the New York cases cited *supra*, note 19; see also DOMKE, *op. cit. supra* note 6, at 335 on freezing operations in occupied and Vichy France.

[64] These seem to be the facts of Brixhe et Deblon v. Würtembergische Transport Versicherungs Gesellschaft, Belgo-German Mixed Arb. Trib., June 8, 1925, 5 RECUEIL, *supra* note 4, at 696.

[65] This was answered in the affirmative, against a strongly motivated decision of the lower courts, by the Belgian Court of Cassation, May 6, 1926, in Jacquain et Morelle v. Société Nef & Cie., Pasicrisie, 1926, I 364, and a Belgian Royal Decree of September 21, 1926, MONITEUR BELGE No. 267; also by an early German decision, OLG. Hamburg, May 30, 1922, 5 HANSEATISCHE RECHTSZEITSCHRIFT 895 No. 184.

times for the sake of convenience in the administration of such businesses.[66] So the question arises, at which place should this debt be deemed "located" when the assets of the branch are forcibly broken loose from the main body. An eminent German writer has answered that any Englishman having dealt with the London branch of the Deutsche Bank, for his credit account, could sue the latter's central office in Berlin without regard to the possibility of being satisfied from the assets of the London branch in liquidation and, conversely also, that the claim of a German national acquired by deposit with the branch in London, was exclusively situated in Berlin, outside of British territory, and therefore not susceptible of English liquidation.[67] Although this is a simple solution, it hardly was intended by the Peace Treaty. Since any customer or, for this matter, any contractual creditor of the branch was entitled to sue the bank at the place of its branch in London, it could not be denied that the debt was, in the language of the English courts, "recoverable, that is situate" there. At this juncture, the English Court of Appeals rendered its only decision involving the subject in a law suit between the New York Life Insurance Company as the debtor of the amount of a life insurance policy, and the English Public Trustee.[68] The insurance was issued by the London office of the company on the life of a German national and became payable during the war. Judge Romer of the lower court declared the debt situated in New York. The Court of Appeals, however, held that as the business of the plaintiff had several "residences" something more than the simple fact of residence was required to constitute the location of the debt. It was, therefore, considered permissible and necessary to look at the terms of the contract. From them it appeared, in Lord Atkin's opinion, that in the case at bar no difficulty really existed at all "because the actual contracts are expressed to be contracts to pay a sterling sum in London."[69] "That right is situate in this country and only in this country."[70]

Reliance was placed upon Dicey's conception that debts or causes in action are generally to be looked upon as situated in the country where they are properly recoverable or can be enforced.[71] Correspondingly the decision has been classified by commentators as among those cases in which a bank debt was regarded as more closely tied to the branch where the account is kept.[72] Where a customer has his account with the branch of a bank and dies, the local connection has been held decisive for the purposes of legal representation, collection and administration.[73] The customer has to demand repayment at this branch[74] and only in the case of non-payment has he the right to sue the bank at its head office, apparently for damages rather than debt.[75] In this environment, we need not be too surprised to see

[66] Reichsgericht, June 25, 1919, 96 RGZ. 161.
[67] Fuchs, *supra* note 1, at 119.
[68] New York Life Ins. Co. v. Public Trustee [1924] 2 Ch. 101.
[69] *Id.* at 121.
[70] *Id.* at 122.
[71] DICEY, CONFLICT OF LAWS (5th ed. by Keith, 1932) 340.
[72] CHESHIRE, *op. cit. supra* note 18, at 443 n. 394.
[73] Rex v. Lovitt [1912] A. C. 212, 219.
[74] Clare & Co. v. Dresdner Bank [1915] 2 K. B. 576; *see* Joachimson v. Swiss Bank Corp. [1921] 3 K. B. 110, 127.
[75] Conclusion by Hill, J., in Richardson v. Richardson [1927] P. D. 228, 232, 234, from various precedents, particularly Leader & Co. v. Direction der Disconto Gesellschaft (1914) 31 T. L. R. 83, 464.

Lord Atkins treat somewhat cavalierly the fear of the New York company that it may be sued again in some country where it has branches or assets. Yet that danger is present; nor is it obviated by the probability that the creditor, being indemnified by his own government[75a] would not make efforts through other channels.

Nevertheless, the theory of the court would have great attraction if it were to be universally adopted. The German Supreme Court followed practically the same course, when confronted with actions instituted against the German or Austrian headquarters of liquidated branches.[76] The court admitted the right of allied powers to liquidate the assets of a German branch and that a debt of the branch was validly discharged by payment, in the course of liquidation, to an allied or neutral creditor, and in the case of German creditors by liquidation of their claims.

Whereas the Reichsgericht declared it immaterial where the debt is payable, the English court relies on elements of the debt, such as payability in London in sterling, quite as in the leading case of garnishment.[77] However, in both cases it would seem that emphasis was laid on the local contact with the branch rather than on considerations of conflict of law. Assuredly, were the conflicts rules on contracts not in the present state of chaos, the governing law and that of the situs might be expected to follow identical criteria.

The two courts have established a common ground on which an international conception may develop. A further contribution is to be found in two New York cases dealing with the liability of a New York insurance company for policies issued by its Russian branch in Czarist times.[78] The Soviet decrees nationalizing the branch abolished the claims of insurance holders in Russia; they did not seek to cancel these debts outright.[79] But this circumstance can hardly determine the effect of the decrees in New York.[80] Despite largely identical facts the two decisions of the highest New York court took the conflicting positions, respectively, that the obligation of the insurance company had its source in the laws of New York; and that the obligation rested on Russian law and had been destroyed by Soviet law. Judge Lehman, though concurring in the result upon another ground, dissented at this point in the second decision; he conceded that though situs was in Russia for some purposes, it was not for others, and he stressed a printed clause in the contract pledging all assets of the company to its fulfillment.

[75a] Cf. Note (1925) 25 COL. L. REV. 366 at 367.

[76] Reichsgericht, June 2, 1923, 107 RGZ. 44 (concerning the London branch of the Dresdner Bank, a leading case, although dealing with negotiable instruments); dec. of May 2, 1924, 108 *id.* 265 (branch of a partnership in Madras); dec. of June 25, 1924, (1925) JUR. WOCH. 248 (London branch of an Austrian Corporation; dec. of April 3, 1925, 110 RGZ. 380 (London branch of the Laenderbank in Vienna); dec. of July 11, 1925, (1926) JUR. WOCH. 1986 (deposit of an employee with the branch of a German corporation in Rabaul, New Guinea); dec. of March 18, 1931, 132 RGZ. 128 (London branch of the Swiss Bank Corporation, much discussed).

[77] See Swiss Bank Corp. v. Boehmische Industrial Bank [1923] 1 K. B. 673, 682.

[78] Sliosberg v. New York Life Ins. Co., 244 N. Y. 482, 155 N. E. 749 (1921); Dougherty v. Equitable Life Assur. Soc., 266 N. Y. 71, 193 N. E. 897 (1934).

[79] See Lehman, J., in the Dougherty case, preceding footnote, 266 N. Y. at 100-109, 193 N. E. at 908-911.

[80] Nussbaum, *Public Policy and the Political Crisis in the Conflict of Laws* (1940) 49 YALE L. J. 1027, 1039.

The problem should be reduced to the inquiry whether, or to what extent, the company was freed from liability for the debts of the branch, by the fact of expropriation. As is well known, a branch, although an integral part of the enterprise, nevertheless, has a certain life of its own within the state of its establishment.[81] Any branch is customarily subject to a great number of administrative provisions of the state in which it operates. Branches of foreign corporations carrying on business in insurance, banking, transportation and other public utilities are controlled to a very high degree. In a case that has become famous, Judge Lehman himself attributed to the New York branch of a Russian insurance company a distinct personality because of the intensive control exercised by the state.[82] The converse case of insurance policies issued by Russian branches of New York companies is comparable, the Czarist Russian government having required the insurance to be submitted to Russian law. Analogous submissions have been taken as grounds by the Swiss Federal Tribunal for holding an insurance contract inaccessible to French war measures,[83] and again by the German Supreme Court for assuming that an insurance policy issued by an Indian branch of the New York Life Insurance Company, later transferred to the Berlin branch of the company, could not be validly seized by the British custodian in India.[84] The contact of any branch, particularly in the field of banking or insurance operations, with the state in which they occur, is so comprehensive that very often the domesticating nature of the license for doing business has been exaggerated. This relation, however, is such as to make it seem natural that a local government taking over or destroying the branch by an exceptional act of sovereignty should include the debts with the assets. Obviously, this was what the Court of Appeals thought.

In accordance with this view, the British Public Trustee of the last war paid allied and neutral creditors[85] out of the seized assets. The French Court of Cassation, disapproving of a partly contrary practice, based its analogous opinion not only on the liability of a debtor's assets for his debts, but, as the case concerned Alsace, on Section 419 of the German Civil Code declaring the transferee of the assets of another person liable by force of law to pay the debts of the transferor.[86]

The creditor, of course, has a claim in case the means of the branch are insufficient and insofar as the enterprise has been enriched by the contract or tort, on which his original cause of action rested.[87] Ancient parallels of the Roman *actio de peculio deve in rem verso* come to the mind.

[81] Carl Wieland (1924) 43 (N. S.) ZEITSCHRIFT FÜR SCHWEIZERISCHES RECHT 271. Conclusions similar to those above have been suggested, as early as 1920, by Ernst Wolff, (1920) JUR. WOCH. 608; (1921) *id.* 245.

[82] Moscow Fire Ins. Co. v. Bank of New York & Trust Co., 280 N. Y. 286, 20 N. E. (2d) 758 (1939), *aff'd* 309 U. S. 624 (1940).

[83] Swiss Fed. Trib., Nov. 4, 1920, 46 BGE. II 421.

[84] Reichsgericht Nov. 11, 1920, (1921) JUR. WOCH. 245.

[85] Fuchs, *supra* note 1, at 209 n. 18.

[86] Deutschmann v. Schisselé, Cass.-civ., Feb. 5, 1924, (1924) REV. JURID. D'ALSACE ET DE LORR. 277, with instructive note by Wilhelm.

[87] This need has been recognized, with some doubts, by Gilligan, *supra* note 14, at 986.

In the last war complications arose from irresponsible waste by trustee administration in probably all belligerent countries. But this lies beyond our subject.

III. SITUS OF CORPORATE STOCK

The Versailles Treaty extended the right of liquidation to all participations in business associations deemed to be in Allied or associated countries. This was not expressly stated in the basic provision of Article 297b, but is nevertheless covered by the text. To implement the provision, Section 10, Paragraph 1, in the annex to Article 298, obligated Germany to deliver within six months to each of the Allied and Associated Powers "all securities, certificates, deed or other documents of title, including any shares, stock, debentures, debenture stocks or other obligations of any company incorporated in accordance with the laws of that Power." The Note of the Allied powers of May 22, 1919, asserted that Section 10 included merely a technical method for liquidating German interests in Allied territories. On these facts the question was highly controversial: in what territory were the shares and certificates situated? Section 10 seemed to suggest this was in the state in which a corporation was organized. German and Swiss writers agreed that German-owned shares in a Swiss corporation, therefore, were exempt from liquidation, irrespective of the location of the certificates, but disagreed on the analogous treatment of participations in German incorporated companies.[88]

American decisions culminating in the opinions of two great jurists in the *Disconto-Gesellschaft* case[89] have focussed attention on an important phase of the matter that was neglected elsewhere, namely, the difference in legal character between the various kinds of certificates. At common law, shares cannot be transferred except by registration on the company's books. Certificates of stock have merely evidentiary value. This conception has continued to underlie many present statutes which at the same time allow the issue of certificates, indorsed in blank and transferable by delivery and yet not conferring the membership itself without subsequent registration. Such was the character, for instance, ascribed in an American[90] and a Canadian[91] case to certificates of the Canadian Pacific Railway. Accordingly, seizure by the American Alien Property Custodian and the Canadian Trustee respectively, were effective at the place of the corporation, irrespective of transfers of the certificates abroad. Also bearer shares and bearer debentures of a gold mine in Transvaal were held to be situated and subject to seizure as enemy property within the Union, irrespective of the place in which the certificates were to be found.[92]

Under English law and the Uniform Stock Transfer Act, however, registered

[88] For the German viewpoint, see ISAY, *supra* note 1, at 95 and Fuchs, *supra* note 1, at 126; for the Swiss, SAUSER-HALL, *supra* note 1, at 69, 70.

[89] Disconto-Gesellschaft v. U. S. Steel Corp., 267 U. S. 22 (1925), opinion by Mr. Justice Holmes, *aff'g* 300 Fed. 741, opinion by Judge Learned Hand.

[90] United Cigarette Mach. Co. v. Canadian Pacific Ry. Co., 12 F. (2d) 634 (C. C. A. 2d, 1926).

[91] Spitz v. Sec. of State of Canada [1939] 2 Dom. L. R. 546 (Exch. Ct. Can.).

[92] Randfontain Gold Mining Co. v. Custodian of Enemy Prop. [1923] A. D. 576 (App. Div. So. Afr.).

certificates, indorsed in blank or in similar form, incorporate the rights of the owner to demand registration as the owner of membership upon the books of the corporation. "Title to a certificate and to the share represented thereby can be transferred only by delivery of the instrument."[93] Accordingly, in the *Disconto-Gesellschaft* case seizure of the shares deposited in London by the English public trustee forfeited them, in the opinion of the Supreme Court of the United States.[94] The same view must be true for shares of the European companies conferring membership on the bearer.

At the beginning of the last war, thousands of American certificates, belonging to German or other nationals, were in deposit of London banks for the account of German banks. The certificates were seized by the American custodian. It has been said that in recognition of the situs at the place of incorporation, the English trustee by a post-war agreement, delivered the certificates to the American custodian.[95] This may have referred to those certificates in which the shares were not fully merged. In one American case, the English trustee seems to have yielded to the petition of the American office for possession of participations in a voting trust, which indeed were transferable only on the books of the corporation.[96]

Thus there was no square decision concerning certificates issued under the New York or New Jersey law, according to the Uniform Act, deposited in a London bank claimed by both American and the English offices.

In what position were neutral companies? The courts have touched but cautiously on this problem. Mr. Justice Holmes asserted the theoretical right of the total governmental powers, federal and state, to "recognize nothing concerning the corporation or any interest in it that happened outside. But it prefers to consider itself civilized and to act accordingly." [97] Hence the indorsement in blank could work in favor of the English Public Trustee. But if the United States had taken a conflicting step, its "paramount power" over the corporation would prevail.

The question, therefore, arises whether, or in what circumstances, a state or nation that has allowed its own corporations to issue bearer certificates going out into the financial markets of the world will find itself justified in restricting the normal effect of their circulation. Police power in its enhanced shape as war power has its own needs and prerogatives. Nevertheless, it is a great merit of the courts of this country to have connected the problem with the normal considerations of commercial convenience and legal construction.

[93] Uniform Stock Transfer Act, §1, 6 U. L. A. (1922). On the problem, see Note (1932) 32 COL. L. REV. 89.

[94] Disconto-Gesellschaft v. U. S. Steel Corp., *supra* note 89; cf. Pomerance, *The Situs of Stock* (1932) 17 CORN. L. Q. 43, 57; Note (1927) 15 CALIF. L. REV. 145, 153.

[95] (1927) 6 RECHTSVERFOLGUNG IM INTERNATIONALEN VERKEHR, Part I, 67.

[96] Miller v. Kaliwerke Aschersleben Aktien-Gesellschaft, 283 Fed. 746 (C. C. A. 2d, 1922).

[97] *See* Disconto-Gesellschaft v. U. S. Steel Corp., 267 U. S. 22, 28 (1925).

CONSTITUTIONALITY OF ALIEN PROPERTY CONTROLS

GEORGE A. MCNULTY*

The controls over alien property that have been utilized during this war are two: one is the freezing control exercised by the Treasury; the other is the Alien Property Custodian's power to supervise and to vest. The Freezing Control has been in effect since April 10, 1940, the day following the invasion of Norway and Denmark. It was inaugurated by Executive Order 8389 issued pursuant to Sec. 5b of the Trading with the Enemy Act. The Custodian's authority derives from Executive Order 9095 of March 11, 1942, as amended by Executive Order 9193 of July 6, 1942, also resting on the Trading with the Enemy Act.

POWERS OF CONGRESS AND THE PRESIDENT

Basic to federal regulation of this sort is the constitutional question: Does the regulation fall within the powers of Congress and the President? Affirmative answer as to both controls seems clear. Executive Order 8389, as amended, establishing the Freezing Control, forbids certain transactions (unless licensed) if those transactions, roughly, involve the property of foreign nationals or are by, for or in the interest of those nationals; the transactions forbidden are movements in bank credits, bank payments, foreign exchange, bullion and currency, and (perhaps the broadest of all) dealings in evidences of indebtedness or evidences of ownership of property by any person within the United States. Analogous freezing of such transactions, except the one last mentioned, under that same 5(b) which, though amended frequently, has been in existence since 1917, had been upheld in the Gold Clause cases even in peace-time.[1] The powers of Congress to regulate transactions in and affecting money and currency;[2] the powers of Congress over transactions affecting interstate and foreign commerce, even if the primary aim be something other than the protection of that commerce and even if the regulation is not incidental to some other federal sphere of activity;[3] the extent of federal power in respect of foreign or external affairs, said to be inherent in sovereignty and not dependent on affirm-

* A.B., 1921, St. Louis University; LL.B., 1925, Harvard University; Member of the Missouri Bar; Special Assistant to the Attorney General and Chief, Alien Property Unit, War Division, Department of Justice, May, 1942 to September, 1944.

[1] Norman v. Baltimore & Ohio R. R., 294 U. S. 240 (1935); Nortz v. United States, 294 U. S. 317 (1935); Perry v. United States, 294 U. S. 330 (1935). [2] *Ibid.*

[3] United States v. Darby, 312 U. S. 100 (1941). And see, as to federal control of instrumentalities of credit and exchange in interstate transactions; United States v. Ferger, 250 U. S. 199, 204 (1919). S.E.C. v. Torr, 15 F. Supp. 315, 320 (S. D. N. Y. 1936), reversed on other grounds, 87 F. (2d) 446 (C. C. A. 2d, 1937); Wright v. S.E.C., 112 F (2d) 89, 94 (C C. A. 2d, 1940).

ative grants of the Constitution;[4] finally, the war powers of Congress and the President[5]—one or more of these powers are adequate bases for the freezing control (leaving out for the moment questions of due process, etc.). Similarly there can be little doubt that the Alien Property Custodian's supervision and vesting, even if vesting includes confiscation, falls within an area over which federal power extends[6]—just what can be done under that power being another question. Moreover, the Freezing Control and the Custodian's authority both rest upon Executive Orders of the President and hence can find support in the war powers and extensive foreign affairs powers that pertain to that office.[7]

DELEGATION TO THE PRESIDENT

It is unnecessary to discuss at length constitutional questions concerning presidential exercise of improperly delegated legislative powers under the Trading with the Enemy Act. Even if (as the writer does not intend to imply) Sec. 5(b) of the Act, as it stood when the President first inaugurated the freezing control, could have been said to lack proper standards relative to declaration of emergencies or the designation of specific foreign countries or to lack both standards and statutory authority for Executive definition of terms like "national" (broadly defined in Executive Order 8389, as amended),[7a] both the Joint Resolution of Congress of May 7, 1940,[8] and the First War Powers Act[9] expressly ratified the presidential orders and the departmental rulings and regulations thereunder. Not only did this Congressional action set at rest any question of unguided delegation as to any transaction thereafter arising[10] but may have validated prior administrative actions,[11] as for as the Freezing Control is concerned.

As to the Custodian's powers, similar conclusions can be reached in favor of the delegated powers, although no administrative background existed, in this war, with reference to supervision and vesting before the 1940 and 1941 amendments of 5(b). For one thing, the same guiding principles approved by Congress for freezing controls would seem applicable. Also, the provision in 5(b) that vested property should be held used, etc., "in the interest and for the benefit of the United States" would seem to supply an adequate standard.[11a] Moreover, the new "vesting" provision of

[4] United States v. Curtiss-Wright Export Corp., 299 U. S. 304 (1936).

[5] Hirabayashi v. United States, 320 U. S. 81 (1943), also a "freezing" case in a sense: restricting movement of the person.

[6] Brown v. United States, 8 Cranch 110 (U. S. 1814); Miller v. United States, 11 Wall. 268 (U. S. 1870); Stoehr v. Wallace, 255 U. S. 239 (1921); United States v. Chemical Foundation, Inc., 5 F. (2d) 191 (C. C. A. 3d, 1925), modified 272 U. S. 1 (1926).

[7] United States v. Curtiss-Wright Export Corp., 299 U. S. 304 (1936); Hirabayashi v. United States, 320 U. S. 81 (1943); United States v. Von Clemm, 136 F. (2d) 968 (C. C. A. 2d, 1943).

[7a] See *infra* p. 137.

[8] 54 STAT. 179 (1940).

[9] 55 STAT. 840 (1941) 50 U. S. C. APP. (1943 Supp.) §§616, 617.

[10] Hirabayashi v. United States, 320 U. S. 81 (1943); United States v. Von Clemm, 136 F. (2d) 968 (C. C. A. 2d, 1943).

[11] Swayne & Hoyt, Ltd. v. United States, 300 U. S. 297 (1937).

[11a] Cf. Currin v. Wallace, 306 U. S. 1 (1939); Mulford v. Smith, 307 U. S. 38 (1939); Nat. Broadcasting Co. v. United States, 319 U. S. 190 (1943).

5(b) is no more lacking in standards than was the old (and still retained) "seizure" provision of Section 7(c), under which World War I seizures were upheld.[11b]

Moreover, there is always the possibility that the above mentioned Executive Orders can stand on the President's war powers and his powers over foreign affairs[12] wholly aside from any question of delegation to him.

SUBSTANTIVE DUE PROCESS

Questions of spheres of federal power and of delegation aside, there is still the problem of due process. The *procedural* due process to which a person is entitled where factual determinations are sought to be established against him will be discussed later. The other facet of due process—*substantive* due process—raises the question of the reasonableness of the regulatory measures. In plain language the problem can be stated: Does the measure in question go too far? The far reaching nature of the controls is noticeable at several points: The broad definition of "national" of a foreign country, the wide category of transactions that are frozen and the possibly drastic meaning of "vesting" of the property of foreign nationals.

Freezing of the Property of a "National" of a Foreign Country

The concept of "national" of a foreign country (as distinguished from "enemy," "ally of enemy," etc., in the original text of the Trading with the Enemy Act), newly introduced by the Executive Orders under consideration, is broadly defined to include:

(i) Any person who has been domiciled in, or a subject, citizen or resident of a foreign country at any time on or since the effective date of this Order.

(ii) Any partnership, association, corporation or other organization, organized under the laws of, or which on or since the effective date of this Order had or has had its principal place of business in such foreign country, or which on or since such effective date was or has been controlled by, or a substantial part of the stock, shares, bonds, debentures, notes, drafts, or other securities or obligations of which, was or has been owned or controlled by, directly or indirectly, such foreign country and/or one or more nationals thereof as herein defined.

(iii) Any person to the extent that such person is, or has been, since such effective date, acting or purporting to act directly or indirectly for the benefit or on behalf of any national of such foreign country, and

(iv) Any other person who there is reasonable cause to believe is a "national" as herein defined.

Without pausing to consider the significance of certain other related provisions, such as who shall determine who is a "national," one readily sees that the foregoing general licenses issued by the Treasury and by the possibility of specific licensing in any particular case. Of course there is a question whether a citizen or friend can be regulated even to the extent of having to seek a license. The answer would seem

[11b] Stoehr v. Wallace, 255 U. S. 239 (1921); United States v. Chemical Foundation, Inc., 5 F. (2d) 191 (C. C. A. 3d, 1925), *modified* 272 U. S. 1 (1926).

[12] See cases cited *supra* footnote 7.

to depend, under accepted due process approach, on whether there is any rational basis for a reasonable belief in the need for the regulation as a means to achieve appropriate ends sought by the Control.[12a] One obvious end is to prevent any transaction which might give aid, material or moral, to the enemy. This end would seem to justify, for instance, freezing regulations calculated to prevent the enemy from cashing in on foreign-owned American-held assets by sales to speculators discounting post-war values. Limitations of space make it impossible to discuss the validity of the freezing controls in the infinite number of situations that might be presented; by way of illustration, the above reasoning would clearly uphold the position, early taken by the Treasury Department in its General Ruling No. 2,[13] that the freezing control prohibits, except under license, the transfer by banking institutions within the United States of stock certificates from or into the names of "nationals" of Norway or Denmark. Short of arbitrary or capricious action in administration, it is difficult to perceive violation of due process under the freezing regulations, whatever might be the case as to destruction or confiscation of property. Due process allows for a margin of error on the side of the conceived public welfare,[14] particularly in wartime.[15]

It is significant that of the attacks in the courts upon the Freezing Control, two cases were voluntarily dismissed;[16] the others have resulted favorably to the Government. One case upheld the conviction of an American citizen making unlicensed payment for diamonds imported from a blocked country.[17] Another case[18] absolved an employer of liability for breach of a contract of employment, both parties being "nationals"[19] of a foreign country, where the contract had been terminated at the instance of the Treasury Department.[20] Two cases have denied an injunction to a

[12a] ". . . regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis. . . ." Mr. Justice Stone, in United States v. Carolene Products Co., 304 U. S. 144, 150 (1938). *A fortiori* it would seem, as to national defense measures. Moreover, the court, in passing upon legislation, is not called upon, as are the other branches of the government, "to determine what, in its judgement, is the most suitable restriction to be applied of those that are possible, or to choose that one which in its opinion is best adapted to all the diverse interests affected." Mr. Justice Stone, in South Carolina Hwy. Dept. v. Barnwell Bros., 303 U. S. 177, 190 (1938).

[13] CODE FED. REGS. SUPP. (1940) 4381.

[14] Cf. Jacob Ruppert v. Caffey, 251 U. S. 264 (1920), upholding, a provision of a statute that defined intoxicating liquor as including beverages that contained even one-half of one percent alcohol.

[15] Hirabayashi v. United States, 320 U. S. 81 (1943).

[16] McLaughlin v. Morgenthau (D. C. S. D. Cal.); Aickelin v. General Aniline & Film Corp. (S. Ct. N. J., Union County). Not reported.

[17] United States v. Von Clemm, 136 F. (2d) 968 (C. C. A. 2d, 1943).

[18] Alexewicz v. General Aniline & Film Corp., 181 Misc. 181, 43 N. Y. S. (2d) 713 (Sup. Ct. Broome County, 1943).

[19] The court, after observing that the employer was a "national" of a foreign country, as defined, said that the employee was also a "national," since as employee he was acting in behalf of a "national." This particular holding was not necessary to the decision and is questionable in that it ignores the possible effect of the limiting words "to the extent that" contained in paragraph (iv) of the definition of a "national." See *supra* p. 137.

[20] The court reasoned that the termination of this contract was a condition that the Treasury Department could impose on the continued operation of the employer's business. Despite certain broad language, the court did not probably mean to intimate that any condition could be imposed. Cf. United States v. Appalachian Power Co., 311 U. S. 377 (1940); United States v. Butler, 297 U. S. 1 (1936); Frost Trucking Co. v. Railroad Commission, 271 U. S. 583 (1926).

designated "national" seeking to prevent the defendant bank from interfering with his withdrawal of funds immobilized under the Freezing Control.[21]

Moreover, unconstitutionality of a regulative scheme is not to be determined by a demonstration that the statutory and administrative provisions are broad enough to permit, in some conceivable hypothetical situations, unconstitutional results. Rather, constitutionality is to be tested with respect to the particular application of the measure to the challenger.[22]

Supervisory Powers

The statutory authority for the supervisory powers delegated to the Alien Property Custodian is precisely the same as that from which the Freezing Control stems.[23] Constitutional questions about these powers, consequently, would seem to turn upon the same considerations as in the case of the freezing power (except that the supervisory powers are hardly related to Congress's authority over currency). Indeed the *Alexewicz* case[24] upheld supervisory action taken by the Secretary of the Treasury (at a time when all powers under 5(b) were delegated to him) and later adopted by the Custodian. Like the freezing power, the Custodian's supervisory powers even as applied to non-enemies probably are not subject to the just compensation requirement of the Fifth Amendment for the reason that their exercise does not amount to a taking of property.

The Vesting Power

The vesting power is conferred by that part of 5(b)(1)(B) which immediately follows the provisions from which flow the Treasury's Freezing Control authority and the Custodian's supervisory powers. The pertinent language is as follows:

". . . and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes. . . ."

At the threshold of any constitutional discussion lies the question of what is meant by "vest" as used in the statute. Even if it means the most extreme of measures, *i.e.,* confiscation without payment (now or ever), that probably does not, of itself, constitute a deprivation of property without due process of law so far as enemies are concerned. At least that is undoubtedly the tenor of an unbroken line of Supreme

[21] Hartmann v. Fed. Res. Bank of Phil., 55 F. Supp. 801 (E. D. Pa. 1944); Carbone Corp. v. First National Bank, 130 N. J. Eq. 111, 21 A. (2d) 366 (1941).

[22] Authority need hardly be cited for this familiar proposition. One recent application of this is to be found in the OPA case, Yakus v. United States, 321 U. S. 414 (1944); an interesting application is to be found in Hendrick v. Maryland, 235 U. S. 610 (1915).

[23] Section 5(b)(1)(B) of the Trading with the Enemy Act as amended, 50 U. S. C. APP. (Supp. III, 1941-1943) §616.

[24] *Supra* footnote 18.

Court decisions,[25] although strenuous efforts have been made to show that the cases do not necessarily so hold.[26] From what has already been said, in the discussion of the Freezing Control, the vesting provision of 5(b) would not be unconstitutional *in toto,* even if it were held unconstitutional as to "nationals" that are non-enemies. Certainly an enemy could not complain because the statute might be invalid as to a "non-enemy."[27]

Still pursuing this analysis, if 5(b) had provided that the property of a "national" of a foreign country should be confiscated, seized, used, sequestrated, disposed of or held in trust, it would not be unconstitutional *in toto.* On the contrary, probably all of the authorized treatments would be constitutional as to some nationals, and some would be constitutional as to any national. And it might be argued that the term "vest" is broadly used in the statute so as to embrace these various ways of treating property of "nationals."

However, no different result would follow if "vesting" be construed, as the writer thinks it must, to connote a *transfer of title* rather than as permitting the above extreme flexibility of control.[27a] The legal consequences that flow from a taking of title by the United States in the exercise of its war powers are not necessarily rigid. As to some classes of "nationals" such a taking might (and constitutionally) mean confiscation without payment; as to others, it might constitutionally require a different consequence. It might, for instance, require the payment of just compensation. The point is, the validity of the title taken (or the validity of a subsequent sale by the Alien Property Custodian) is to be distinguished from the property owner's rights, if any, against the United States. The question of title may be concluded by the vesting, irrespective of what such other rights may be. In other words, it does not follow either that all takings must be confiscatory or that no takings can be confiscatory.

This position is at variance with the analysis formulated by John Foster Dulles,[28] of the New York Bar, who concludes that since it could not have been the intent of

[25] Cummings v. Deutsche Bank und Disconto Gesellschaft, 300 U. S. 115 (1937); Henkels v. Sutherland, 271 U. S. 298 (1926); Miller v. United States, 11 Wall. 268 (U. S. 1870); Brown v. United States, 8 Cranch. 110 (U. S. 1814); United States v. Chemical Foundation, Inc., 5 F. (2d) 191 (C. C. A. 3d, 1925), *modified,* 272 U. S. 1 (1926).

[26] See Littauer, *Confiscation of the Property of Technical Enemies* (1943) 52 YALE L. J. 739, 757-8, where even the Cummings case (see preceding footnote) is apparently analyzed to mean no more than that alien enemies can be divested of every right so far as may be necessary "for the purpose of retaining part of the enemy property as security for American claims." Small comfort would seem derivable from this qualification in this war.

[27] Cf. cases cited *supra* footnote 22.

[27a] The term "vest" ordinarily connotes a transfer of title. This usual meaning is buttressed here by legislative history which plainly shows that the powers conferred on the President to use, administer, liquidate, sell or otherwise deal with vested property "in the interest of and for the benefit of the United States" were not granted for conservatory purposes. Mere conservatory powers might not serve the interests of the United States, and the Congressional debates show Congress was intent not upon safe-guarding the interests of the persons whose property was to be vested, but the interests of the United States in using such property. They show Congress intended that the property might be completely expended if the President or his delegate deemed that would serve the war effort of the country. 87 CONG. REC. (Part 9, 77th Cong., 1st Sess., Dec. 16, 1941, House), pp. 9856, 9861, 9862, 9866.

[28] Dulles, *The Vesting Powers of the Alien Property Custodian* (1943) 28 CORN. L. Q. 245.

Congress to make 5(b) either a condemnation statute or a confiscation statute (because it applies in war and peace, to enemy and non-enemy) it must be merely a regulatory measure. This would make "vesting" a sort of conservation receivership or trusteeship, although coupled, in view of the specific language of 5(b), with power to hold, use, administer, liquidate or sell, just as often is the case with other holders of non-beneficial title. One difficulty with the above "regulation" analysis is that it assumes that vesting must mean only one of three possibilities: condemnation, confiscation or regulation. The writer, on the other hand, conceives of "vesting" as a generic term that can include them all.

Another difficulty with the theory that the vesting power is simply a facet of a purely regulatory statute is that the legislative history of Title III of the First War Powers Act, 1941, considered as a whole, hardly supports it. If there is anything that is plain from the legislative history, it is that Congress, 11 days after Pearl Harbor, intended to authorize the use of every power our government constitutionally possessed to wage total war, economic as well as military.[29] Moreover, the Supreme Court has construed the old Trading with the Enemy Act as a confiscatory statute, stemming from the constitutional provision empowering Congress "to declare war . . . and make rules concerning captures on land and water."[30]

In view of the situation that confronted Congress when it enacted the First War Powers Act, and in view of the Congressional debates on the measure, it seems clear that Congress did not intend to withhold from the President a power given him during the last war and consistently held to be constitutional,[31] namely, the power to confiscate the property of enemies and of those aiding the enemy's cause.

The case of alien friends, it is true, presents a different situation. It must be presumed that Congress intended to act constitutionally when it authorized the vesting of their property. The *Russian Volunteer Fleet* case holds that taking the property of alien friends without compensation would be unconstitutional.[32] However, the court that decided that case did not have before it the situation that confronted this nation when the First War Powers Act of 1941 was enacted. One consideration militating against construing 5(b) as in part a condemnation statute is that the assurance of eventual payment to alien friends might permit the Axis invaders, by techniques of duress, to effectuate sale of American-held assets during the war in return for crucially needed foreign exchange, thus enabling the enemy to cash in on assets of coerced persons in occupied nations. Consequently it is possible that due process, which does not require the *best* solution of a difficulty,[33] would not foreclose seizure

[29] (1941) SEN. REP. No. 911, 77th Cong., 1st Sess., p. 2. See (1941) H. R. Rep. No. 1507, 77th Cong., 1st Sess. (1941) for a substantially similar statement on the part of the House Committee. See also 87 CONG. REC., 9801, 9828, 9855 to 9868, 9893 to 9895, 9946, 9947.

[30] Stoehr v. Wallace, 255 U. S. 239, 241 (1921).

[31] See cases cited *supra* footnote 25.

[32] Russian Volunteer Fleet v. United States, 282 U. S. 481 (1931). In the case of nationals of some countries it would also be a violation of our treaties.

[33] Cf. South Carolina Hwy. Dept. v. Barnwell Bros., 303 U. S. 177 (1938).

without a right to compensation if Congress eventually took some reasonable action for the protection of friendly aliens.[34]

In any event, even if citizens and alien friends must, at the least, be afforded a right to just compensation for the "vesting" of their property, it does not follow that merely regulatory powers were conferred upon the Custodian. There is no inherent reason why Section 5(b) cannot operate in part as a condemnation act. If, in order to avoid unconstitutionality implication be raised[36] that compensation is intended with respect to the property of alien friends, this is sufficient, despite the silence of the statute, to maintain suit under the Tucker Act[37] against the United States.[38] The same argument would hold with regard to other persons who are "nationals" but not enemies, including American citizens whose property was vested by mistake where a return does not make them whole (although it might be argued that mistaken vestings are tortious actions for which the Tucker Act provides no remedy). The argument does not hold for enemies; there is no reason to believe that 11 days after Pearl Harbor, Congress was squeamish about taking enemy property or that it intended that the American taxpayer bear the burden of compensation.

The effort to construe 5(b) as not authorizing confiscation, even of enemy property, seems to stem from the notion that confiscation is abhorrent to present day international law and should be unconstitutional.[39] This view has never been accepted by the courts in this country[40] and the concepts of Grotius and Rousseau do not fit present-day war. War has again become total almost in the same degree as when savage tribes annihilated and enslaved one another. The theory that war is exclusively the concern of the Prince and his professional soldiers and that the citizens of the state are to be isolated from its rigors, is as inapplicable to Japan and Germany as it was to the horde of Genghis Khan. The "regulation" theory would create the great practical disadvantage, as Dulles points out, that the property would immediately revert upon the expiration of the present emergency (unless, of course, Congress did something about it in the meantime).

PROCEDURAL DUE PROCESS

Besides the question of the degree of property invasion that can be visited upon enemies or other "nationals," there are certain constitutional requirements embodied in the concept of "due process" regarding the procedure for establishing

[34] For example, due process might be satisfied by eventual payment of compensation to the government of the national in question, leaving that government to settle the score with the claimant.

[36] Cf. Becker Steel Co. v. Cummings, 296 U. S. 74 (1935); Yearsley v. W. A. Ross Construction Co., 309 U. S. 18 (1940); Hamburg American Co. v. United States, 277 U. S. 138 (1928); Portsmouth Harbor L. & H. Co. v. United States, 260 U. S. 327 (1922); Jacobs v. United States, 290 U. S. 13 (1933).

[37] 36 STAT. 1136 (1911), 28 U. S. C. (1940 ed.) §250.

[38] Jacobs v. United States, *supra* footnote 36; Phelps v. United States, 274 U. S. 341 (1927); United States v. Cress, 243 U. S. 316 (1917).

[39] Dulles, *supra* footnote 28; Turlington, *Vesting Orders Under the First War Powers Act, 1941* (1942) 36 AM. J. INT. L. 460; BENTWICH, THE LAW OF PRIVATE PROPERTY IN WAR (1906); BORCHARD, DIPLOMATIC PROTECTION OF CITIZENS ABROAD (1915).

[40] Cases cited *supra* footnote 25.

the fact that a person is an enemy or other "national." If the crucial fact can be tried in court, procedural due process difficulties largely disappear, assuming, of course, that proper procedure is otherwise observed in the court action. This is not to say that the constitutional difficulties are otherwise insuperable, to be discussed later.

This brings up an interesting problem as to 5(b) vestings. In December, 1941, after Pearl Harbor, by Title III of the First War Powers Act, Congress adopted a new Section 5(b) to go into the old Trading with the Enemy Act. Conceivably, this new Section 5(b) could be viewed as if it were a separate autonomous statute all by itself with its own sanctions, etc. On the other hand, it could be viewed as simply another section tying in with and to be synthesized with the rest of the Act. The significance is this: The Act still retains old Section 9(a); by that section any person not an enemy or ally of enemy (old World War I words of art) claiming an interest in property seized by "the Alien Property Custodian" may institute suit in the federal courts to establish his interest and obtain appropriate relief. If that remedy extends to 5(b) vestings, the day in court that 9(a) gives obviates a major procedural due process difficulty. The trouble is that the literal language of 9(a) would permit anybody not an enemy or ally of an enemy to step into court and recover property even if he is a "national," thereby nullifying the vesting that 5(b) expressly provides for such a "national." One way, however, to avoid this and still treat 9(a) as affording a judicial remedy for 5(b) vestings is to say that 9(a) must *now* be construed in the light of the new 5(b) and consequently requires the claimant to establish, in order to succeed in a 9(a) court action, that he is not even a 5(b) "national." Indeed this was Judge Bondy's approach in the *Draeger* case,[41] thus synthesizing 9(a) with 5(b).

The synthesis itself, however, raises certain due process problems as to those nationals whose property is not constitutionally subject to confiscation. If 9(a) applies it is the plaintiff's only remedy.[42] What will happen if a 9(a) plaintiff concedes that he is a 5(b) "national" but convinces the court that he is not an enemy whose property is forfeit? Has he no redress, such as a claim under the Tucker Act for just compensation? If not, is 5(b) constitutional in its application to him?

It is no answer to say that to date the Custodian has exercised his vesting power only over the property of true enemies or persons found to have been acting for them. For example, the property of many persons has been vested on the ground that they have been "acting or purporting to act directly or indirectly for the benefit

[41] Draeger Shipping Co. v. Crowley, 49 F. Supp. 215 (S. D. N. Y. 1943). The same result is reached in Kenji Iki v. Crowley (not reported) and in Hayden *et al.* v. Crowley (not reported). In Duisberg v. Crowley, 54 F. Supp. 365 (D. N. J. 1944) the court held it unnecessary to pass upon the question whether 5(b) has amended 9(a) because it construed the complaint, which alleged that plaintiff was a resident American citizen, was the "sole and absolute" owner of the property and that it was taken from him without "warrant of law," as in effect denying that plaintiff is a national as defined.

[42] Stern v. Newton, 39 N. Y. S. (2d) 593 (1943); The Brennero, 53 F. Supp. 441 (1944); J. C. Pflueger v. United States, 121 F. (2d) 732 (1941), *cert. denied* 314 U. S. 617 (1941); Sigg-Fehr v. White, 285 Fed. 949 (App. D. C. 1923).

or on behalf of a national" of a designated enemy country. Although the language of the *Miller* case is broad,[43] it is not certain that every person who is found to have been acting for the benefit or on behalf of a foreign national to an extent that warranted the vesting of his property will be judicially held to be an enemy subject to forfeiture.

Again, the definition of "national" (*supra* page 137) includes a person "who there is reasonable cause to believe is a 'national' as herein defined." Although in wartime there is great leeway in preventive measures based on reasonable belief,[44] it may be doubted that an American citizen's property can be confiscated on that basis.[45]

The questions above posed lead us to reconsider Judge Bondy's analysis. The difficulty with that analysis is that little support can be found for it in the history of 5(b) or in its language or in the legislative debates on Title III of the First War Powers Act, 1941.

It must be remembered that the vesting power, conferred by the 1941 Amendment, was added to the pre-existing powers to regulate and control coin, bullion, and currency, transactions in foreign exchange, etc. Neither at the inception of these powers in 1917 nor at their revival in 1933, nor upon their expansion at the outbreak of World War II did Congress give any indication that these powers were subject to review by 9(a) proceedings. Despite the litigation growing out of the 1933 and 1934 amendments[46] (the Emergency Banking Act of March 9, 1933 and the Gold Reserve Act of January 31, 1934) it occurred to no one that a 9(a) remedy was available.

An examination of the original act and of the history of executive action under it confirms the thesis that a 9(a) remedy is available *only as against actions taken under Section 7(c)*. Original Section 6 authorized the appointment of "an Alien Property Custodian" who was empowered "to receive all money and property in the United States due or belonging to an enemy or ally of enemy." Section 7(c) authorized the Custodian to seize such property. Section 9(a) was a procedural complement of 7(c), providing a remedy for persons "not an enemy or ally of enemy" who claimed title to or an interest in money or property seized by the Alien Property Custodian and held by him or by the Treasurer of the United States. The terms "enemy" and "ally of enemy" were words of art defined in Section 2. Furthermore, Sections 6, 12, 24 and others of the 1917 Act provided a complete code

[43] Miller v. United States, 11 Wall. 268 (U. S. 1870). However, the case involved an active resident of enemy territory using the seized property in active raid of the enemy.

[44] Hirabayashi v. United States, 320 U. S. 1 (1943).

[45] The aggrieved person in the Hirabayashi case, preceding footnote, was a citizen, but this was not a confiscation case.

[46] See e.g., cases cited *supra* footnote 1; Nortz v. United States, 294 U. S. 317 (1935); Uebersee Finanz-Korporation A. G. v. Rosen, 83 F. (2d) 225 (C. C. A. 2d 1936); Blanchard v. United States, 86 Ct. Cl. 585 (1938); Smith v. United States, 88 Ct. Cl. 169 (1938); Alaska-Juneau Gold Mining Co. v. United States, 94 Ct. Cl. 15 (1941); United States v. Campbell, 5 F. Supp. 156 (S. D. N. Y. 1933); British-American Tobacco Co. Ltd. v. Federal Reserve Bank of New York, 104 F. (2d) 652; 105 F. (2d) 935 (C. C. A. 2d, 1939).

for the administration of property taken over by the Alien Property Custodian, without coming anywhere near 5(b).

In the post-war administration of World War I enemy property, the office of Alien Property Custodian envisaged in Section 6 was eventually abolished and its functions transferred to the Department of Justice by Executive Order 6694, May 1, 1934.[47] At the time of the enactment of the First War Powers Act of 1941, the old Section 6 Alien Property Custodian functions were being exercised by the Attorney General. After the enactment of the First War Powers Act in 1941, the President first delegated all 5(b) powers to the Secretary of the Treasury,[48] who shortly thereafter vested, for example, substantially all the stock of General Aniline & Film Corporation, a Delaware corporation, on the ground that the shares were held by "nationals of a foreign country." It was not until March 11, 1942, that the President established, by Executive Order 9095, in the office for Emergency Management of the President, "the office of Alien Property Custodian," at the head of which there was to be *"an Alien Property Custodian."* In April, 1942, the Department of Justice functions under the 1917 Act were transferred to the new Alien Property Custodian. This transfer, however, was only for the duration of the war and six months thereafter. On July 6, 1942, a further Executive Order re-distributed and re-delegated the power of the President under amended 5(b) to both the Alien Property Custodian and the Secretary of the Treasury, prescribing the jurisdiction of each.

Now, it must be emphsized that 9(a) authorizes actions only against the Alien Property Custodian or the Treasurer, not against other officers.[49] It would seem clear that there is no jurisdiction under 9(a) over a suit against the Secretary of the Treasury; the same is true of the new World War II "Alien Property Custodian," who merely happens to have the same name as the occupant of the old World War I office. No "Alien Property Custodian" is referred to in 5(b) and it is sheer coincidence that the President used that term to designate the new delegate of the President's authority. That authority could have been, and at various times has been, delegated to other officers.[50]

The committee reports relative to Title III of the First War Powers Act of 1941[51] and the debates on the floor disclosed an intent to confer upon the President, and to include in 5(b), authority for a complete and autonomous system of foreign property control. For one thing, there was doubt as to whether the old Act was still vital;[52] it was felt that an entirely new measure was desirable. The legislative

[47] Further powers under the Act were delegated to the Department of Justice by EXEC. ORDER No. 8136, May 15, 1939, 4 FED. REG. 2044 (1939). [48] 7 FED. REG. 1409 (1942).

[49] Cf. Von Bruning v. Sutherland, 29 F. (2d) 631 (App. D. C. 1928).

[50] Including, besides the officers already mentioned, the Secretary of Agriculture, the Farm Security Administrator, and the Regional Director of the Farm Security Administration for Region IX; 7 FED. REG. 2713, 2715, 2747 (April 9 and 10, 1942).

[51] See H. R. REP. No. 1507, 77th Cong., 1st Sess. (1941) 2-3; SEN. REP. No. 911, 77th Cong., 1st Sess. (1941) 2.

[52] On December 11, 1941, Mr. Summers introduced H. R. 6206 which would have reenacted all of the provisions of the original Trading with the Enemy Act "which have for any reason ceased to be in effect." Senator Reed pointed out: "The Trading with the Enemy Act is today of doubtful validity; no one knows definitely whether it was repealed by the Knox Resolution." 77 CONG. REC. 60 (1933).

history of H. R. 6233, eventually the First War Powers Act of 1941, indicates that new 5(b) was to be self-sufficient and unfettered by the rest of the old Act, much of new 5(b) covering matters already embodied in other sections of the old Act.[53] Moreover, 5(b)'s provisions conferring broad powers to investigate, to require the keeping of books and records and the furnishing of information, to request the production of and if necessary to order the seizure of books and records, to prescribe definitions, rules, and regulations—all of these show an intent that 5(b) should be self-sufficient.

It is submitted, in view of all these reasons, that 9(a) is not an essential procedural complement of 5(b).

Constitutionality of an Autonomous 5(b)

One reason that Judge Bondy was led to synthesize 9(a) and 5(b) in the *Draeger* case[54] was that he seemed to have doubts whether an autonomous 5(b), silent as to remedies available to a person administratively found to be a "national," would otherwise be constitutional.[54a] It is submitted that these doubts are not well-founded. For one thing, 5(b) is not entirely silent; it contains general language which would seem adequate to authorize the President or his delegate to set up flexible remedial machinery. The section provides that the President may vest property "when as and upon the terms directed by him," and further provides that "on such terms and conditions as the President may prescribe, such interests or property shall be held, used, administered, liquidated, sold or otherwise dealt with in the interest and for the benefit of the United States, and such designated agency or person may perform all acts incident to the accomplishment or furtherance of such purposes. . . ." As a matter of fact, both the Secretary of the Treasury[55] and the Alien Property Custodian[56] have prescribed rather full regulations setting forth a complete administrative procedure for persons having claims to property vested or controlled pursuant to 5(b). Although 5(b) does not spell out the administrative procedures set up by the Secretary of the Treasury and by the Alien Property Custodian, this is not fatal, for the language of the statute would seem broad enough to provide for such procedures.[57]

Furthermore, even if the Secretary of the Treasury or Custodian lacked authority to provide administrative remedies, the fact remains that they did so and that

[53] Thus, 5(b) has an acquittance provision like that in old 7(e); a penalty provision like that in old 16; another provision almost bodily the substance of old 18; power to delegate is found in 5(b) and also elsewhere.

[54] *Supra* footnote 41.

[54a] In this respect Judge Bondy's position is fortified by a statement in the opinion rendered in Standard Oil Company v. Markham, 57 F. Supp. 332 (S. D. N. Y. 1944). In the Standard Oil case the Government did not raise the question whether 9(a) is available for the return of property vested under 5(b). The court consequently was proceeding on the assumption that 9(a) and 7(c) which makes 9(a) the exclusive remedy, were applicable. Following the World War I cases, the court said: "The existence of a right upon the part of claimant to regain his wrongfully seized property, and to do so completely, is essential to the constitutionality of the Act." This is not to say, however, that the right necessarily could not be secured by an administrative as distinguished from a purely judicial remedy.

[55] 7 FED. REG. 1021 (1942).

[56] 7 FED. REG. 2290 (1942) 8 FED. REG. 16709 (1943).

[57] Cf. Goldsmith v. United States Board of Tax App., 270 U. S. 117 (1926), and the concurring opinion of Mr. Justice Stone in United States v. Illinois Central Ry. Co., 291 U. S. 457, 464 (1934).

the remedies are being widely utilized. True, the *Goldman* case[58] indicates that a wholly unauthorized administrative procedure need not be exhausted before recourse may be had to the courts, but in that case, the court found not even an *implied* authorization and, besides, the agency involved had not set up any general regulation for the procedure in question. Indeed, the administrative procedure that has been set up by the Secretary of the Treasury under 5(b) (and which is very similar to that set up by the Custodian) has already been recognized and upheld in two cases to the extent of invoking the doctrine that a claimant must exhaust those administrative remedies before resorting to the courts.[59] In any event, it would seem questionable that the constitutionality of a statute could be successfully challenged on the ground that the plaintiff had no adequate remedy if in fact he were provided with one, though gratuitously. It may be that, as the Supreme Court has recently indicated in another connection, when the issue is one of due process of law, it is the end result that counts.[60]

Neither is it an essential condition of the constitutionality of a statute that Congress make detailed provision for judicial review. The courts have always found ways to review administrative determinations even in the absence of directions from Congress.[61] If due process prevents, on the substantive side, confiscation of the property of some "nationals" in line with the previous discussion, the way seems open for the determination of claims by procedures that comply with procedural due process requirements.

PENDING LEGISLATION

There remains to be considered the effect the enactment of pending legislation would have on the constitutionality of Section 5(b). A bill for the amendment of Title III of the First War Powers Act, 1941, sponsored by the Office of the Alien Property Custodian and by the Department of Justice, was introduced in the Senate and the House on May 19, 1944. The Senate Bill was S. 1940 and the House Bill H. R. 4840. The bills were referred to the Committee on the Judiciary of the Senate and of the House, respectively.

This proposed amendment would in large measure adopt Judge Bondy's synthesis, but at the same time it would obviate the difficulties, referred to above, which would result from acceptance of the synthesis under existing legislation. The bills provide that any person claiming an interest in vested property may, after filing a claim with the Custodian, institute a suit in equity in the appropriate United States

[58] Goldman v. American Dealers Service, 135 F. (2d) 398 (C. C. A. 2d, 1943).

[59] Cases cited *supra* footnote 21.

[60] Fed. Power Comm. v. Hope Nat. Gas Co., 320 U. S. 591 (1944).

[61] American School of Magnetic Healing v. McAnnulty, 187 U. S. 94 (1902) (postal fraud order); Ng Fung Ho v. White, 259 U. S. 276 (1922) (alien deportation); United States *ex rel.* Riverside Oil Co. v. Hitchcock, 190 U. S. 316 (1903) (determination by the Land Office of the extent of a land grant); Lloyd Sabaudo Societa Anonima v. Elting, 287 U. S. 329 (1932) (imposition of fine by Secretary of Labor for bringing diseased aliens into the United States); SEN. DOC. No. 8, 77th Cong., 1st Sess., REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE ("Administrative Procedure in Government Agencies," 1941) 81. See also this Committee's MONOGRAPH No. 13, "Post Office Department," SEN. DOC. No. 186, 76th Cong., 3d Sess., Part 12, at 7, 38; also, MONOGRAPH No. 15, "War Department," at 4; MONOGRAPH No. 20, "Department of the Interior," at 46.

District Court for the recovery of such interest (or the proceeds thereof if it has been sold prior to the institution of the action), and further provide that the claimant can prevail in such an action only if the court adjudicates that he is not "a foreign country or national thereof." The bills also make plain the right of a foreign national who is not an enemy (presumably this would include United States citizens who were "determined" by the Secretary of the Treasury to be foreign nationals) to sue for just compensation under the Tucker Act.[62] Like the 1917 Trading with the Enemy Act, the amendment would provide that the relief and remedy provided therein are exclusive. The bills, if enacted, would seem to lay at rest any doubts as to the constitutionality of Section 5(b) insofar as it authorizes the vesting of property of foreign "nationals." Citizens who can establish that they are not foreign nationals would be given a remedy,[63] already established as adequate.[64] Foreign "nationals" who are entitled to the protection of the Fifth Amendment (including certain citizens as well as friendly aliens) would be given a remedy for just compensation. These bills, which do not deal with ultimate disposition of enemy property and claims, would create no remedies for enemies.

CONCLUSION

Freezing Control and the supervisory authority of the Custodian seem to rest firmly upon a compendium of the powers of the national government to wage war and to regulate currency, commerce and the external relations of the nation.

Amendments to the statute have eliminated problems of unconstitutional delegation of legislative powers.

The vesting power, like the freezing and supervisory powers, would seem to be unfettered by the restrictive provisions of the 1917 Trading with the Enemy Act, including those provisions of Section 9(a) which permit any person not an "enemy" or "ally of enemy" to recover property conveyed to or seized by the Section 6 Alien Property Custodian.

Considered as autonomous, the vesting provisions of Section 5(b) are not unconstitutional as failing to spell out an administrative or judicial remedy. The Act is an enabling grant of power and its broad terms authorize the establishment of an administrative procedure, which in fact has been provided and which the courts will review even in the absence of directions from Congress. This is an adequate remedy for non-foreign nationals whose property has been vested by mistake. The law will imply a promise to pay just compensation in the case of alien friends and other non-enemies whose property 5(b) authorizes the President to vest.

Pending legislation would, if enacted, set at rest any doubts as to the constitutionality of the vesting power conferred by 5(b).

[62] Cf. Russian Volunteer Fleet v. United States, 282 U. S. 481 (1931).

[63] The bills contain elaborate provisions for the treatment of debt claims which are not discussed herein since there is no constitutional requirement that any relief be accorded to creditors of the former enemy owners of seized property. See Kogler v. Miller, 288 Fed. 806 (C. C. A. 3d, 1923); and cf. Miller v. Robertson, 266 U. S. 243, 248 (1924); Pusey & Jones Co. v. Hanssen, 261 U. S. 491 (1923).

[64] Stoehr v. Wallace, 255 U. S. 239 (1921); Kahn v. Garvan, 263 Fed. 909 (S. D. N. Y. 1920).

CONSTITUTIONALITY OF ALIEN PROPERTY CONTROLS: A COMMENT ON THE PROBLEM OF REMEDIES

HERBERT WECHSLER*

Under the Trading with the Enemy Act, as it was fashioned during the last war, Section 9(a) afforded a judicial remedy for the return of property which the Custodian had no authority to seize. The *Draeger Shipping Company* case holds that this statutory remedy is available in this war if the Custodian vests without authority of law, as his present authority is defined in the First War Powers Act. My comment is addressed to Mr. McNulty's objections to this result.

First: Mr. McNulty finds in the history of the First War Powers Act evidence that Section 5(b) was intended to be "unfettered by the rest of the old Act," that it was designed to be "self-sufficient." Whatever may be the case with respect to the powers granted by Section 5(b), I think the conclusion overdrawn if it is taken to apply to the remedy of judicial return provided by Section 9(a). Section 5(b) took its present form because Congress, faced with a problem of appalling complexity in determining the provisions of the old Act which had not expired with the passage of time, chose to make an explicit statement of the substantive powers conferred. If I read the record aright, this preoccupation with the scope of granted powers was the dominant theme in Congressional consideration of the bill. It may be, therefore, that the substantive powers conferred by Section 5(b) may be divorced in various respects from the limitations upon similar powers as they are embodied in other provisions of the Trading with the Enemy Act. But the history of the legislation is completely silent with respect to the problem of remedies. I read this to mean that Congress delegated such powers as it did against the background of traditional remedies, including the remedy for unauthorized seizure provided by Section 9(a) in terms which do not restrict its continuing vitality. This seems to me a far more satisfactory inference to draw from Congressional silence than the inescapable uncertainty as to remedies which Mr. McNulty's conclusion involves. I should require evidence that Congress regarded Section 9(a) as extinct to reach the result that it does not apply to vesting under Section 5(b) and I find no such evidence. I conclude, therefore, that in characterizing Section 5(b) as an amendment to the Trading with the Enemy Act, Congress placed it in organic relationship to the judicial remedy of return embodied in Section 9(a).

* A.B., 1928, College of City of New York; LL.B., 1931, Columbia University; Assistant and Associate Professor of Law, Columbia University, 1933-38. Member of the New York Bar. At present Assistant Attorney General of the United States in charge of the War Division, Dep't of Justice.

Second: That the authority to vest under Section 5(b) may be exercised by "such agency or person as may be designated from time to time by the President" while the remedy specified in Section 9(a) runs against the "Alien Property Custodian or the Treasurer of the United States" does not, in my view, establish that the two sections are independent of each other. Title I of the First War Powers Act, in substance almost identical with the Overman Act of 1918, empowered the President, "in matters relating to the conduct of the present war, to make such redistribution of functions among executive agencies as he may deem necessary, including any functions, duties, and powers hitherto by law conferred upon any executive department, commission, bureau, agency, governmental corporation, office, or officer." In view of the flexibility of any allocation of function under Title I, I find it difficult to limit remedies by the titles of particular officials rather than the functions to which they relate.

Third: In so far as it afforded a judicial remedy against *unauthorized* takings of property, Section 9(a) was fundamentally undisturbed by the amendment of Section 5(b). It continues to be available as a remedy against unauthorized takings of property. In this connection, the only effect of the amendment of Section 5(b) is to authorize takings of property which would have been unauthorized prior to the amendment.

In so far as Section 5(b) creates a new class of authorized takings, i.e., takings from foreign nationals who are not enemies within the definition of the old Act, it reduces the scope of unauthorized takings against which the judicial remedy afforded by Section 9(a) may be brought to bear. This means that a Federal District Court sitting "in equity," as Section 9(a) provides, would continue to make the same kind of determination in a suit for return as it would have made under the old Act. In deciding whether the claimant was "entitled" to have his property back, however, the court would be bound by the new definition of authority to take property embodied in Section 5(b) rather than by the old definition embodied in Section 7(c).

It is apparent, therefore, that I do not share Mr. McNulty's difficulty when he says (p. 143): "The trouble is that the literal language of 9(a) would permit anybody not an enemy or ally of an enemy to step into court and recover for property even if he is a 'national,' thereby nullifying the vesting that 5(b) expressly provides for such a 'national.'" Under the "literal language of 9(a)" a person who is not an enemy or an ally of enemy but who is nevertheless a foreign national, would not, in my judgment, be "entitled" to have his property returned, since Section 5(b) expressly authorizes the taking of such property. I believe, therefore, that a judge sitting in equity and fully respecting the letter of Section 9(a) would find a statutory bar to an order for return in the language limiting returns to those "entitled" to the property.

Fourth: If a person other than an enemy or ally of enemy as defined in the old Act is nevertheless a foreign national within the scope of Section 5(b), and if

further, he is entitled to immediate compensation under the Fifth Amendment in accordance with the doctrine of the *Russian Volunteer Fleet* case, Mr. McNulty may be right in suggesting that the Tucker Act would afford an appropriate judicial remedy. But it is not necessary to divorce Section 5(b) from the Act of which it is a part to reach this result. The provision in Section 7(c) of the Trading with the Enemy Act that "the sole relief and remedy of any person having any claim to any money or other property . . . shall be that provided by the terms of this Act" is not so clear a barrier to the jurisdiction of the Court of Claims as Mr. McNulty assumes. Is a person suing for just compensation a person "having a claim to any money or other property" seized by the Custodian? Since he would be seeking pecuniary redress payable only on the theory that such money or property has been placed beyond his legal power to compel return there is force in the suggestion that Section 7(c) does not apply. And even if 7(c) applies, there remains the further possibility that Section 5(b) has qualified Section 7(c), so far as constitutionally necessary, to permit access to the Court of Claims.

CONCLUSION

These views accept Section 5(b), as amended, in the posture in which it was enacted, as an amendment, and, therefore, an organic part of the Trading with the Enemy Act. If they have no other virtue, they simplify to a considerable extent the constitutional issues with which Mr. McNulty deals.

A BRIEF AGAINST CONFISCATION

OTTO C. SOMMERICH*

During the first World War the Alien Property Custodian seized enemy-owned property and funds in an amount aggregating about six hundred million dollars.[1] Most of this or its proceeds has been returned from those from whom it was taken or has been paid to persons having claims against them. About sixty-five million dollars is still held by the Government.[2]

When the United States entered the second World War in December, 1941, the amount of enemy-owned property and funds in this country was smaller than when we entered the earlier war in April, 1917, notwithstanding that Italy and Japan were not then among our enemies.[3] About eight and a half billions in foreign-owned assets has been subjected to Government control since the first freezing order was issued in April, 1940.[4] But the amount of enemy-owned property and funds, apart from patents, that has been vested or frozen by the Alien Property Custodian or the Treasury Department, is only about four hundred and forty million dollars. The nationality of the owners is as follows: German, $150,000,000; Italian, $100,000,000; Japanese, $150,000,000; Bulgarian, Rumanian, and Hungarian, $40,000,000.[5]

When war occurs, it was said many years ago, every individual of the hostile nation is an enemy.[6] "There is no such thing as a war for arms and a peace for commerce."[7] But total war, though not a new concept, has in the twentieth century acquired a new meaning. A nation which permitted property and funds in its territory to remain in the control of residents of the enemy country would be helping the enemy nation to arm itself and to wage war.

Seizure of such potential resources of the enemy is demanded by imperious necessity. But whether private property thus seized shall be confiscated or shall ultimately be returned is a question governed by other factors. The question must be answered in the light of international law, the historic practice of the United States, and considerations of American interest and of justice.

* A.B., 1896, College of the City of New York; A.M., 1898, LL.B., 1899, Columbia University. Member of the New York Bar. Chairman, Special Committee on Custody and Management of Alien Property of the American Bar Association.

[1] REPORT OF OFFICE OF ALIEN PROPERTY CUSTODIAN (1943) 94.

[2] *Hearing before Subcommittee of House Judiciary Committee on H. R. 4840*, 78th Cong., 2d Sess. (June 9, 1944) 14.

[3] REPORT, *supra* note 1, at 1-2, 94. [4] *Hearing, supra* note 2, at 105. [5] *Ibid.*

[6] *See* The Rapid, 8 Cranch 155, 161 (U. S. 1814), per Johnson, J.

[7] Sir John Nicholl, the King's Advocate, in Potts v. Bell, 8 T. R. 548, 554 (1800), quoted by Chancellor Kent in Griswold v. Waddington, 16 Johns. 438, 466 (N. Y. 1819).

Property of enemy nationals which is captured at sea is deemed lawful prize; amelioration of this rule has been urged, notably by the United States, but without success.[8] Property which is the subject of trading with the enemy is invariably regarded as liable to confiscation.[9] As to enemy-owned private property which is in a belligerent's territory on the outbreak of war, a different rule, however, has long prevailed.

In a leading case which arose from the first World War, it was remarked that in the beginnings of English law the bodies of alien enemies found within the realm were seized and their goods were forfeit to the Crown, that the first relaxation was in favor of the merchant class, a provision to that effect being included in Magna Charta, and that from merchants protection spread to others.[10] Treaties of peace commonly provided for the restoration of private property and debts.[11] Confiscation, as distinguished from sequestration, of debts owed to enemy nationals was long ago characterized by an English court as "contrary to good faith" and "not conformable to the usage of nations."[12] During the first World War, eminent English judges asserted that private property of enemy subjects, found within the realm at the commencement of a war, cannot lawfully be confiscated.[13]

The first treaty made by the United States, the treaty with France in 1778, contained a provision (Article XX) that "if a war shall break out between the said two nations, six months after proclamation of war shall be allowed to the merchants in the cities and towns where they live for selling and transporting their goods and merchandizes."[14] In 1784 the Continental Congress adopted resolutions declaring that it would be advantageous to conclude treaties of amity and commerce with the principal commercial powers of Europe and directing that, in the formation of these treaties, it be proposed that, if war should arise, "the merchants of either party then residing in the other, shall be allowed to remain nine months to collect their debts and settle their affairs, and may depart freely, carrying off all their effects without molestation or hindrance."[15] Provisions in substantially this language were included in a long series of treaties made by the United States during the ensuing century.[16]

[8] Higgins and Colombos, International Law of the Sea (1943) 370-377; Hall, International Law (8th ed., 1924) §147, p. 528; Moore, International Law and Some Current Illusions (1924) 20; *infra* notes 48-50.

[9] The Hoop, 1 Ch. Rob. 196 (High Ct. Adm'ty, 1799); The Rapid, 8 Cranch 155 (U. S. 1814).

[10] *See* Techt v. Hughes, 229 N. Y. 222, 230, 128 N. E. 185 (1920), per Cardozo, J. See authorities cited in this opinion. Statements of Grotius, Bynkershoek, and Vattel are cited in many of the cases; see, for example, Ware v. Hylton, 3 Dall. 199 (U. S. 1796), and Brown v. United States, 8 Cranch. 110 (U. S. 1814), *passim*.

[11] *See* Ware v. Hylton, 3 Dall. 199, 247 (U. S. 1796); Hall, International Law (8th ed. 1924) 523.

[12] *See* Wolff v. Oxholm, 6 M. & S. 92, 100, 106, 105 E. R. 1177, 1180, 1182 (1817).

[13] Lord Parker of Warrington, in The Roumanian, [1916] 1 A. C. 124, 135; Lord Finlay, L. C. (later a judge of the Permanent Court of International Justice), in Hugh Stevenson & Sons, Ltd. v. Aktiengesellschaft für Cartonnagen-Industrie, [1918] A. C. 239, 244.

[14] 1 Malloy, Treaties, Conventions, International Acts, Protocols and Agreements (1910) 468, at 475.

[15] 3 Secret Journals of the Continental Congress (1823) 484.

[16] Martin and Clark, American Policy Relative to Alien Enemy Property, Sen. Doc. No. 181, 69th Cong., 2d Sess. (1926) 5, 19 *et seq*. Such a provision is not applicable to property of a resident of the enemy country. *See* Stoehr v. Wallace, 255 U. S. 239, 251 (1921).

When, in 1798, war with France appeared imminent and the treaty with that country was abrogated, Congress enacted a statute which provided that "aliens resident within the United States, who shall become liable as enemies" because of a declaration of war with their nation, "and who shall not be chargeable with actual hostility, or other conduct against the public safety, shall be allowed, for the recovery, disposal and removal of their goods and effects, the full time . . . stipulated by any treaty, where any shall have been between us and the hostile nation or government," and which further provided that "where no such treaty shall have existed, the President of the United States may ascertain and declare such reasonable action as may be consistent with the public safety, and according to the dictates of humanity and national hospitality."[17] This statute continued to be law until the enactment of the Trading with the Enemy Act in 1917.

Such provisions as these, in treaties and in a statute, are incompatible with the manner in which war is now waged. They are evidence, however, of the practice and policy of the United States with respect to enemy-owned private property.

During the Revolutionary War most of the states enacted statutes for the confiscation or sequestration of property and debts.[18] Some directed such measures only against persons who had removed to England or to Canada or who had gone into the British lines or joined the British Army. Some states confiscated also all British-owned property and debts. In the Treaty of Peace between the United States and Great Britain it was agreed that creditors on either side "shall meet with no lawful impediment to the recovery of the full value . . . of all bona fide Debts heretofore contracted" and also that "the Congress shall earnestly recommend it to the Legislatures of the respective States, to provide for the Restitution of" confiscated "Estates, Rights and Properties" of "real British subjects" and also of other persons if these had not borne arms against the United States.[19]

Some of the states complied with the treaty provision and with the recommendation which was duly made by the Congress. Other states failed to comply and many British subjects were unable to collect their debts or to recover their property.[20] Settlement of their claims was one of the subjects embraced in the Jay Treaty of 1794, the United States agreeing, in Article VI of that treaty, to make full compensation to British creditors for losses occasioned by "lawful impediments."[21] In 1802 Congress appropriated the sum of $2,664,000 in payment of the British claims.[22]

In *Ware v. Hylton*,[23] where the Treaty of Peace was held by the Supreme Court to nullify a sequestration statute of Virginia and to revive a British creditor's right to recover his debt, several of the justices spoke emphatically concerning confiscation. Justice Paterson stated that he would not "controvert the position, that, by the rigour of the law of nations," debts owed to an individual of an enemy nation may be con-

[17] Act of July 6, 1798, 1 STAT. 577.

[18] Turlington, *Treatment of Enemy Private Property before the World War* (1928) 22 AM. J. INT. L. 270, 271-272; GATHINGS, INTERNATIONAL LAW AND AMERICAN TREATMENT OF ALIEN ENEMY PROPERTY (1940) 15-29.

[19] 1 MALLOY, *op. cit. supra* note 14, at 588.

[20] 5 HAMILTON'S WORKS (Lodge ed., 1885) 6.

[21] 1 MALLOY, *op. cit. supra* note 14, at 594.

[22] Act of May 3, 1802, 2 STAT. 192.

[23] 3 Dall. 199 (U. S. 1796).

fiscated, but remarked that this rule "has by some been considered as a relic of barbarism" and, "perhaps, is generally exploded at the present day in Europe." He added:

"The truth is, that the confiscation of debts is at once unjust and impolitic; it destroys confidence, violates good faith, and injures the interests of commerce. . . . The gain is, at most, temporary; whereas the injury is certain and incalculable, and the ignominy great and lasting. . . . Confiscation of debts is considered a disreputable thing among civilized nations of the present day; and indeed nothing is more evincive of this truth, than that it has gone into general desuetude, and whenever put into practice, provision is made by the treaty, which ends the war, for the mutual and complete restoration of contracts and payment of debts."[24]

"When the United States declared their independence," said Justice Wilson, "they were bound to receive the law of nations, in its modern state of purity and refinement. By every nation, whatever its form of government, the confiscation of debts has long been considered disreputable; and, we know, that not a single confiscation of that kind stained the code of any of the European powers, who were engaged in the war, which our Revolution produced."[25]

Shortly before these judicial pronouncements, the subject had been discussed by Alexander Hamilton with the extraordinary lucidity and reasoning power which were among the marks of his genius. In a memorandum submitted to President Washington, in which he analyzed each of the twenty-nine articles of the Jay Treaty, he said concerning Article VI:

"The article of the former treaty [i.e., the Treaty of Peace] on this head was, as I conceive, nothing more than the formal sanction of a doctrine which makes part of the modern law or usage of nations. The *confiscation* of private debts in time of war is reprobated by the most approved writers on the law of nations, and by the negative practice of civilized nations, during the present century. The free recovery of them, therefore, on the return of peace, was a matter of course, and ought not to have been impeded, had there been no article."[26]

Besides the provision in Article VI, the Jay Treaty contained, in Article X, a provision reading as follows:

"Neither the debts due from individuals of the one nation, to individuals of the other, nor shares, nor monies, which they may have in the public funds, or in the public or private banks, shall ever in any event of war or national differences be sequestrated or confiscated, it being unjust and impolitick that debts or engagements contracted and made by individuals having confidence in each other, and in their respective Governments, should ever be destroyed or impaired by national authority on account of national differences and discontents."[27]

"In my opinion," said Hamilton, "this article is nothing more than an affirmance of the modern law and usage of civilized nations, and is valuable as a check upon a measure which, if it ever could take place, would disgrace the government of the country, and injure its true interests." He continued:

[24] *Id.* at 254-255.
[25] *Id.* at 281.
[26] 4 Hamilton's Works (Lodge ed., 1885) 328.
[27] 1 Malloy, *op. cit. supra* note 14, at 597.

"The general proposition of writers on the law of nations is, that all enemy's property, wherever found, is liable to seizure and confiscation; but reason pronounces that this is with the exception of all such property as *exists in the faith of the laws of your own country;* such are the several kinds of property which are protected by this article.

"And though in remote periods the exception may not have been duly observed, yet the spirit of commerce, diffusing more just ideas, has been giving strength to it for a century past, and a negative usage among nations, according with the opinions of modern writers, authorizes the considering the exception as established."[28]

Hamilton discussed the Jay Treaty more fully in a series of letters published over the signature "Camillus." In one of these, after alluding to Article X as "an obstacle the more to the perpetration of a thing, which, in my opinion, besides deeply injuring our real and permanent interest, would cover us with ignominy," he declared:

"No powers of language at my command can express the abhorrence I feel at the idea of violating the property of individuals, which, in an authorized intercourse, in time of peace, has been confided to the faith of our Government and laws, on account of controversies between nation and nation. In my view every moral and every political consideration unite to consign it to execration. . . .[29]

"The right of holding or having property in a country always implies a duty on the part of the government to protect that property, and to secure to the owner the full enjoyment of it. Whenever, therefore, a government grants permission to foreigners to acquire property within its territories, or to bring and deposit it there, it tacitly promises protection and security. . . . Property, as it exists in civilized society, if not a creature of, is, at least, regulated and defined by, the laws. They prescribe the manner in which it shall be used, alienated, or transmitted; the conditions on which it may be held, preserved, or forfeited. . . . No condition of enjoyment, no cause of forfeiture, which they have not specified, can be presumed to exist. An extraordinary discretion to resume or take away the thing, without any personal fault of the proprietor, is inconsistent with the notion of property."[30]

The spirit of the clause of the Constitution that "no State shall impair the obligation of contracts," he asserted, "must, on fair construction, be regarded as a rule for the United States; and if so, could not easily be reconciled with the confiscation or sequestration of private debts in time of war."[31]

After reviewing the statements of writers on international law, Hamilton said:

"The consequence is that if the right pretended did exist by the natural law, it has given way to the customary law; for it is a contradiction, to call that a right which cannot be exercised without breach of faith. The result is, that by the present customary law of nations, within the sphere of its action, there is no right to confiscate or sequester private debts in time of war. . . .[32]

"But let it not be forgotten, that I derive the vindication of the article from a higher source, from the natural or necessary law of nature—from the eternal principles of morality and good faith."[33]

Hamilton made it clear that he was speaking only of private property:

[28] 4 HAMILTON'S WORKS (Lodge ed., 1885) 343.
[29] 5 *Id.* at 60.
[30] *Id.* at 68-69.
[31] *Id.* at 62.
[32] *Id.* at 86.
[33] *Id.* at 90.

"A government may rightfully confiscate the property of an adversary government. No principle of justice or policy occurs to forbid reprisals upon the public or national property of an enemy. That case is foreign, in every view, to the principles which protect private property. The exemption stipulated by the tenth article of the treaty is accordingly restricted to the latter."[34]

Justice Story, in a notable case, did not concur in Hamilton's view that confiscation was forbidden by the law of nations, but said:

"Looking to the measure, not as of strict right, but of sound policy and national honor, I have no hesitation to say, that the argument is unanswerable. He proves incontrovertibly, what the highest interests of nations dictate, with a view to permanent policy. . . ."[35]

In 1814, when the Supreme Court decided a large number of cases involving the law of prize and applied rigorously the rule which condemns to confiscation enemy-owned private property captured on the high seas and property engaged in trade with the enemy, it had occasion also, in *Brown v. United States*,[36] to deal with a case arising from a seizure of enemy-owned property on land within the territory of the United States. Congress had enacted no statute authorizing such a seizure and the Court held, in an opinion by Chief Justice Marshall, that a declaration of war did not, "by its own operation, so vest the property of the enemy in the government, as to support proceedings for its seizure and confiscation." The Chief Justice, after stating that "war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found," added:

"The mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but cannot impair the right itself.

". . . it is not believed that modern usage would sanction the seizure of the goods of an enemy on land, which were acquired in peace, in the course of trade. Such a proceeding is rare, and would be deemed a harsh exercise of the rights of war. . . . The rule, like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign; and although it cannot be disregarded by him without obloquy, yet it may be disregarded."[37]

Marshall's statement that usage, though it will affect the exercise of the right to confiscate, "cannot impair the right itself," is at variance with the carefully reasoned conclusion of Hamilton[38] and has been criticized by John Bassett Moore as embodying an inconsistency. "Between the effect of usage on rights and on the exercise of rights," Judge Moore asserts, "the law draws no precise distinction."[39] For "the true theory of the law," he suggests, we may turn to "an opinion of the same great judge," delivered twenty years later, in which, alluding to "the modern rule in cases of conquest," Marshall said:

[34] *Id.* at 94.

[35] *See* The Emulous, 1 Gall. 563, Fed. Cas. No. 4,479, 8 Fed. Cas. 697, 702 (C. C. Mass., 1913), rev'd in Brown v. United States, 8 Cranch 110 (U. S. 1814), where Justice Story's opinion in the Circuit Court is again reported.

[36] 8 Cranch 110 (U. S. 1814).

[37] *Id.* at 122-124, 128.

[38] *Supra* notes 28, 32.

[39] 7 Moore, Digest of International Law (1906) 313; Moore, International Law and Some Current Illusions (1924) 18-19.

"The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated, and private rights annulled."[40]

Chancellor Kent, the first American to undertake a connected statement of the rules of international law, spoke of the right of confiscation as a "naked and impolitic right, condemned by the enlightened conscience and judgment of mankind."[41]

Of the wars in which the United States was engaged during the nineteenth century, the Civil War was the only one in which the Government confiscated enemy-owned property. Two statutes to that end, enacted in 1861 and 1862,[42] were held by a divided court, in *Miller v. United States*,[43] to be a lawful exercise of the war powers of the Government, and not an exercise of its sovereign or municipal power, and consequently not subject to the restrictions imposed by the Fifth and Sixth Amendments. Referring to the powers conferred on Congress by the Constitution, Justice Strong, who delivered the opinion of the Court, said:

"Of course the power to declare war involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted. It therefore includes the right to seize and confiscate all property of an enemy and to dispose of it at the will of the captor. This is, and always has been, an undoubted belligerent right. If there were any uncertainty respecting the existence of such a right it would be set at rest by the express grant of power to make rules respecting captures on land or water."[44]

Justice Field, in a dissenting opinion in which Justice Clifford concurred, asserted that the statutes could not be regarded as an exercise of the war powers but were penal measures imposing punishment for treason. He said:

"The war powers of the government have no express limitation in the Constitution, and the only limitation to which their exercise is subject is the law of nations. That limitation necessarily exists. . . . The power to prosecute war granted by the Constitution . . . is a power to prosecute war according to the law of nations, and not in violation of that law. The power to make rules concerning captures on land and water is a power to make such rules as Congress may prescribe, subject to the condition that they are within the law of nations. There is a limit to the destruction which government, in the prosecution of war, may use, and there is a limit to the means of capture and confiscation, which government may authorize, imposed by the law of nations, and is no less binding upon Congress than if the limitation were written in the Constitution."[45]

Although the statutes were upheld by a majority of the Court as war measures, it is clear from their text that they were not merely war measures. They used the

[40] *See* United States v. Percheman, 7 Pet. 51, 86-87 (U. S. 1833).

[41] KENT, COMMENTARIES, *65, quoted in Hanger v. Abbott, 6 Wall. 532, 536-537 (U. S. 1868).

[42] Turlington, *supra* note 18, at 284-286.

[43] 11 Wall. 268 (U. S. 1871).

[44] *Id.* at 305. *See* Draeger Shipping Co. v. Crowley, 55 F. Supp. 906, 908 (S. D. N. Y., 1944). But see, as to the meaning of the term "capture," MOORE, INTERNATIONAL LAW AND SOME CURRENT ILLUSIONS (1924) 21-22.

[45] *See* 11 Wall. (U. S. 1871) at 315-316.

words "insurrection" and "rebellion" and, in view of their provisions as well as their terminology, and of the situation in which they were enacted, they cannot be regarded as a precedent for the confiscation of enemy-owned property.[46]

In an earlier case arising from the Civil War, the Supreme Court referred with approval to the statements of Kent and of Wheaton condemning the confiscation of private debts.[47]

Congress in 1904 adopted a resolution declaring it to be desirable "that the President endeavor to bring about an understanding among the principal maritime powers with a view of incorporating into the permanent law of civilized nations the principle of the exemption of all private property at sea, not contraband of war, from capture or destruction by belligerents."[48] At the first of the Hague Peace Conferences, in 1899, the American delegates had urged the adoption of a proposal conforming with this principle.[49] Secretary of State Root, in instructing the American delegates to the Second Peace Conference, held in 1907, alluded to "the traditional policy of the United States," described the Resolution of 1904 as "an expression of the view taken by the United States during its entire history," and said:

"Whatever may be the apparent specific interest of this or any other country at the moment, the principle thus declared is of such permanent and universal importance that no balancing of the chances of probable loss or gain in the immediate future on the part of any nation should be permitted to outweigh the considerations of common benefit to civilization which call for the adoption of such an agreement."[50]

February 8, 1917, two months before the United States entered the first World War, Secretary of State Lansing issued, with the President's authorization, the following statement:

"The Government of the United States will in no circumstances take advantage of a state of war to take possession of property to which international understandings and the recognized law of the land give it no just claim or title. It will scrupulously respect all private rights alike of its own citizens and of the subjects of foreign states."[51]

In the Trading with the Enemy Act,[52] adopted six months after we entered the war, Congress followed the spirit of this statement. The Act authorized the President to appoint an Alien Property Custodian with power to take possession of "all money or property in the United States due or belonging to an enemy, or ally of enemy."[53] It provided that "After the end of the war any claim of any enemy or ally of enemy to any money or other property received by the alien property custodian or deposited in the United States Treasury, shall be settled as Congress shall direct."[54] In its report on the bill the Senate Committee on Commerce quoted, and

[46] 2 HYDE, INTERNATIONAL LAW (1922) §621, p. 238.
[47] *See* Hanger v. Abbott, 6 Wall. 532, 536, 537 (U. S. 1868).
[48] 33 STAT. 592 (1904).
[49] 6 HACKWORTH, DIGEST OF INTERNATIONAL LAW (1943) 599.
[50] *Id.* at 598-599.
[51] New York Times, Feb. 9, 1917, p. 2, col. 7.
[52] Act of Oct. 6, 1917, 40 STAT. 411, 50 U. S. C. APP. §1 *et seq.*
[53] *Id.* at §6.
[54] *Id.* at §12.

adopted as its own, a statement of the general principles governing the bill which Charles Warren, assistant attorney general of the United States, the principal draftsman of the bill, had made at one of the hearings. The statement included the following:

"One of the most important features of the bill is that which provides for the temporary taking over of enemy property, its conservation in the hands of the alien property custodian, and its investment in United States bonds. . . .

"The theory of the bill is that enemy property in this country shall not remain in the hands of the enemy's debtor or agent here; but that, if the President so directs, it shall be temporarily conscripted by the Government to finance the Government through investment in its bonds, and to be paid back to the enemy or otherwise disposed of at the end of the war as Congress shall direct. In other words, we fight the enemy with his own property during the war; but we do not permanently confiscate it. Moreover, this temporary conscription of enemy property is also conservation of enemy property; for it is taken from the hands of debtors or agents, as to whose solvency the enemy would otherwise have to assume the risks, and invested in the safest security in the world—United States bonds—or deposited in Government depositaries."[55]

As was later said by a committee of the House, "The text of the trading with the enemy act as orginally enacted, the reports of the committees accompanying the bill, the discussion on the floor of both Houses of Congress, and numerous court decisions under the original act, clearly indicate that the act contemplated sequestration rather than confiscation."[56]

This view was reiterated also by the Alien Property Custodian three weeks after he took office. He said:

"The broad purpose of Congress as expressed in the Trading with the Enemy Act is, first, to preserve enemy-owned property situated in the United States from loss and, secondly, to prevent every use of it which may be hostile or detrimental to the United States . . . [A] trustee, appointed and paid by the United States, is charged with the duty of protecting and caring for such property until the end of the war. This is his function. There is, of course, no thought of the confiscation or dissipation of the property thus held in trust."[57]

Soon, however, the Custodian took a different view of his function. The statute empowered him to dispose of property, by sale or otherwise, "if and when necessary to prevent waste and protect such property and to the end that the interests of the United States in such property and rights of such persons as may ultimately become entitled thereto, or to the proceeds thereof, may be preserved and safe-

[55] SEN. REP. No. 113, 65th Cong., 1st Sess. (1917) 3.

[56] H. R. REP. 1623, 69th Cong., 2d Sess. (1926) 4 (House Committee on Ways and Means, Report on Settlement of War Claims Bill). For excerpts from debates in Congress, see GATHINGS, INTERNATIONAL LAW AND AMERICAN TREATMENT OF ALIEN ENEMY PROPERTY (1940) 64-65. Among the judicial opinions are: American Exchange National Bank v. Palmer, 256 Fed. 680, 685 (S. D. N. Y., 1919); Stöhr v. Wallace, 269 Fed. 827, 839 (S. D. N. Y., 1920); Banco Mexicano v. Deutsche Bank, 289 Fed. 924 (App. D. C., 1923); Techt v. Hughes, 229 N. Y. 222, 244-245, 128 N. E. 185 (1922); Gregg's Estate, 266 Pa. 189, 194, 109 Atl. 777 (1920).

[57] Bulletin No. 159.

guarded."[58] By an amendment of March 28, 1918,[59] adopted at the Custodian's instance, these qualifying words were replaced by the words, "in like manner as though he were the absolute owner thereof." The Custodian was thus given a general power of sale, subject only to the proviso that any property, except when sold to the United States, should be sold at public sale to American citizens unless the President in the public interest should otherwise determine.

Going far beyond the purposes which he had stated in urging this amendment,[60] the Custodian now proceeded to carry out what he described as "Americanization" of enemy-owned property.[61] Especially notable was his disposition of a great number of patents seized early in 1919 under the authority given by an amendment of November 4, 1918.[62] In April, 1919, 4,700 of these patents and a large number of trade-marks were sold for $250,000 to the Chemical Foundation, a corporation formed for the purpose of acquiring them and holding them in trust for the chemical industry of the United States. In 1922 the Government brought a suit, which eventually proved unsuccessful, to set aside this sale.[63]

In the amendment of March 28, 1918,[64] there was also a provision authorizing the President to purchase, and, if they could not be thus procured, to take possession of, the docks and equipment of the German ship lines on the Hudson River, Congress to "make just compensation therefor to be determined by the President." German ships had been seized under a Joint Resolution of May 12, 1917, which likewise provided that "just compensation" should be made.[65]

After the termination of hostilities, Congress authorized the return of seized property to several classes of persons who were enemies within the definition of the statute but to whom it was deemed proper to make restitution without further delay.[66] In recommending the passage of one of these bills in 1920, the House Committee on Foreign and Interstate Commerce said:

"The United States, while holding approximately $556,000,000 worth of private property which is found in this country belonging to individual citizens of enemy countries residing in their country at the outbreak of the war and still residing there, does not intend to confiscate this property. It was the intention of Congress when the

[58] This was the original language of §12 of the Trading with the Enemy Act, 40 Stat. 423 (1917); see "Historical Note" to 50 U. S. C. A. App. (1928) §12.

[59] Act of March 28, 1918, ch. 28, §1, 40 Stat. 460, 50 U. S. C. App. §12.

[60] Gathings, *op. cit. supra* note 18, at 77.

[61] Report of Alien Property Custodian (1919) 15. See Moore, International Law and Some Current Illusions (1924) 22; Moore, *Fifty Years of International Law* (1937) 50 Harv. L. Rev. 395, 419-421.

[62] Act of Nov. 4, 1918, ch. 201, §1, 40 Stat. 1020, 50 U. S. C. App. §7.

[63] United States v. Chemical Foundation, 272 U. S. 1 (1926), modifying 5 F. (2d) 191 (C. C. A. 3d, 1925), which aff'd 294 Fed. 300 (D. Del., 1924). Attorney General Harlan F. Stone, in his brief in this case in the Circuit Court of Appeals (p. 156) denounced the transaction as "a dangerous precedent in American public life." In his oral argument he characterized the transaction as subversive of the future of the country; see Borchard, *Nationalization of Enemy Patents* (1943) 37 Am. J. Int. L. 92, 93.

[64] *Supra* note 59. [65] Jt. Res. of May 12, 1917, ch. 13, 40 Stat. 75.

[66] Act of July 11, 1919, ch. 6, 41 Stat. 35; Act of June 5, 1920, ch. 241, 41 Stat. 977; Act. of Feb. 27, 1921, ch. 76, 41 Stat. 1147. These successive enactments amended §9 of the Trading with the Enemy Act.

property was taken that it should merely be held in custody during the war and that after the war the property or its proceeds should be returned to the owners. It has never been the purpose or the practice of the United States to seize the private property of a belligerent to pay our Government's claims against such belligerent. Such practice is contrary to the spirit of international law throughout the world."[67]

In the Joint Resolution of July 2, 1921,[68] known as the Knox-Porter Resolution, in which the state of war between the Unted States and the German and Austro-Hungarian governments was "declared at an end," there was included a provision that all property of those governments or of their nationals, in the possession of the United States, should be retained until those governments or their successors "shall have respectively made suitable provision for the satisfaction of all claims" of American citizens against them. The resolution was incorporated in the treaties of peace which were signed in August, 1921.[69] The German government undertook, in its treaty, to reimburse persons in its territory whose property had been seized by the Alien Property Custodian. From the debate in Congress on the Knox-Porter Resolution and the debate in the Senate on the ratification of the treaties of peace, it appears that the provision relating to the seized property was not regarded as confiscating the property.[70]

Under the treaty of peace with Germany and a subsequent agreement of August 10, 1922,[71] a Mixed Claims Commission was established for the determination of American claims against Germany.

In 1923 Congress passed an act, known as the Winslow Act,[72] which provided for the return of property or of its proceeds in all cases in which the value did not exceed $10,000. If the value exceeded that sum, an amount up to $10,000 was to be returned.

Three years later a bill known as the Mills bill was introduced in the House.[73] It provided, as was stated in a committee report on a later measure, "for the immediate return of all property held by the Alien Property Custodian to its rightful owners and for the settlement of the claims of American citizens by an advance from the Treasury, the said advance to be repaid from the funds received by the United States Government, through the Reparation Commission, from Germany on account of the Dawes Plan annuities. . . ."[74]

American claimants against Germany opposed this bill and suggested that a compromise plan be worked out. At the instance of the House Committee on Ways and Means, conferences were held between representatives of the American claimants and of German interests and an agreement was reached.[75] A bill, based

[67] H. R. REP. No. 1089, 66th Cong., 2d. Sess. (1920) 3.
[68] 42 STAT. 105 (1921).
[69] 42 STAT. 1939, 1946 (1921).
[70] GATHINGS, INTERNATIONAL LAW AND AMERICAN TREATMENT OF ALIEN ENEMY PROPERTY (1940) 89.
[71] 42 STAT. 2200 (1922).
[72] Act of March 4, 1923, ch. 285, 42 STAT. 1511.
[73] H. R. 10,820, 69th Cong., 1st Sess. (1926). See 67 CONG. REC. (1926) 7597.
[74] H. R. REP. No. 17, 70th Cong., 1st Sess. (1927) 3 (Report of House Committee on Ways and Means on H. R. 7201).
[75] See respondent's brief, pp. 42-46, in Cummings v. Deutsche Bank, 300 U. S. 115 (1937); *Hearings before Senate Committee on Finance*, 67th Cong., 2d Sess (1927) 129.

on this agreement, was favorably reported after extended hearings before the committees of the Senate and of the House and, on March 10, 1928, the Settlement of War Claims Act became law.[76]

One of the supporters of the bill accurately described it as a "compromise measure" which "cannot be defended upon academic grounds or upon strict principles of municipal or international law," but which was the result of "years of negotiation and consideration."[77] The Act provided for the payment in full of claims of American nationals against Germany, the payment of claims of German nationals for ships, patents, and a radio station seized by the United States, the total for these, however, not to exceed $100,000,000, the immediate return of 80 per cent of the German property or its proceeds still held by the United States, and the ultimate return of the remainder. Return of the 80 per cent to German nationals was made conditional on their consenting in writing to postponement of delivery of the remainder. Moneys to be received by the United States under the Dawes Plan were to be included in the funds from which the foregoing payments were to be made.

All property of Austrian and Hungarian nationals was to be returned on the payment by their governments of an amount sufficient to pay the awards of the Tripartite Claims Commission on claims of American citizens against those governments or their nationals. That amount was later paid by the Austrian and Hungarian governments.

In 1930 the United States and Germany entered into a Debt Funding Agreement in which Germany undertook to pay a specified amount annually in satisfaction of awards made by the Mixed Claims Commission.[78] The payments were not made and in June, 1934, Congress adopted a resolution,[79] known as Public Resolution No. 53, and also as the Harrison Resolution, which provided that, so long as Germany remained in arrears, all payments under the Act of 1928 should be postponed. This resolution was held by the Supreme Court to be a valid bar to the recovery of funds for which a claim had been filed before the resolution was adopted.[80] The United States, the Court held, had acquired absolute title to the property which it seized and consequently the grant made by the Act of 1928 "was made as a matter of grace" and withdrawal of the grant by the resolution did not violate the Fifth Amendment. But the Court remarked:

> "Legislative history and terms of measures passed in relation to alien enemy property clearly disclose that from the beginning Congress intended after the war justly to deal with former owners and, by restitution or compensation in whole or part, to ameliorate hardships falling upon them as a result of the seizure of their property."[81]

That this was still the policy of the Government of the United States is clear

[76] Act of March 10, 1928, ch. 167, 45 Stat. 254. [77] Senator King in 69 Cong. Rec. (1928) 3167.
[78] U. S. Sec. Treas. Annual Report (1930), H. R. Doc. No. 526, 71st Cong., 3d Sess. (1930) 341.
[79] Jt. Res. of June 27, 1934, ch. 851, 48 Stat. 1267.
[80] Cummings v. Deutsche Bank, 300 U. S. 115 (1937), rev'g Deutsche Bank v. Cummings, 65 App. D. C. 297, 83 F. (2d) 554 (1936). [81] *Id.*, 300 U. S. at 120-121.

from a statement made by Secretary of State Hull within a year after the adoption of the Harrison Resolution:

"It is important . . . that the United States should not depart in any degree from its traditional attitude with respect to the sanctity of private property within our territory whether such property belongs to nationals of former enemy powers or to those of friendly powers. A departure from that policy and the taking over of such property, except for a public purpose and coupled with the assumption of liability to make compensation, would be fraught with disastrous results."[82]

There can be no doubt as to the course dictated by international law with respect to enemy-owned private property. Nor can there be any question as to what has been the traditional American policy. That policy has contributed to establishing more securely the rule of international law on the subject.

Of the $150,000,000 in German property and funds and the $150,000,000 in Japanese property and funds seized or frozen by the United States, some is government-owned. This may and should be confiscated. The lawfulness and propriety of such a course are clear.[83] Nor should confiscation be restricted to that which is admittedly government-owned. It should be applied to property and funds which, though ostensibly private, are in fact government-owned. Among the owners, individual or corporate, there may be some that held the property or funds as agents of an enemy government. In such a case, the cloak of private ownership should be of no avail; the property is public property and, under well established principles of international law, is subject to confiscation.[84]

Some of the property or funds seized or frozen as enemy-owned may later prove not to be in fact enemy-owned; this occurred after the last war. In addition, there will be some which is subject to claims of Americans against the enemy owners. The balance will be large, but the amount should not tempt the United States to incur what Chief Justice Marshall characterized as the "obloquy" attaching to confiscation.[85] In 1802, when the nation was young, the Government appropriated a substantial sum from the treasury to compensate British creditors whose debts had been confiscated during the Revolutionary War.[86] The principle which was thus vindicated cannot now with impunity be disregarded.

The considerations of justice and self-interest which demand the return of private property are as valid and cogent today as when they were so eloquently expounded by Hamilton a century and a half ago. "The United States," Judge Moore has observed in this regard, "has an honorable past as well as an expedient future to consider."[87] And, as he also asserted, "purely as a matter of selfish calculation" it is "directly contrary to the interests of the United States to resuscitate the doctrine

[82] Letter to Senator Capper, May 27, 1935.

[83] HAMILTON'S WORKS, *supra* note 34; 2 HYDE, INTERNATIONAL LAW (1922) §620, p. 235; 2 OPPENHEIM, INTERNATIONAL LAW (6th ed., 1940) §§102, 261-262.

[84] Carroll, *Legislation on Treatment of Enemy Property* (1943) 37 AM. J. INT. L. 611, 630.

[85] *Supra* note 37.

[86] *Supra* note 22.

[87] MOORE, INTERNATIONAL LAW AND SOME CURRENT ILLUSIONS (1924) 24.

that enemy private property found in a country on the oubreak of war may be confiscated."[88]

Referring to "the rule that private property within the jurisdiction belonging to citizens of the enemy state is inviolable," Edwin M. Borchard has pointed out:

"The rule was not adopted in any sudden burst of humanitarian sentiment, but was the result of an evolution of centuries. It rests upon a sound development in political and legal theory which was deemed natural and incidental to the evolution of civilization. . . ."[89]

The treatment of enemy-owned private property, Professor Borchard rightly asserts, "lies at the foundation and may be used as a criterion of the future of international relations."[90]

As John Dickinson said in summing up a wise discussion of the subject, "if the United Nations intend to build a durable peace, there should be no confiscation of the privately-owned property which has been seized and sequestrated."[91]

Never has it been more important that the governance of international law and the standard of international morality be securely established. On the maintenance of these will largely depend, in the final analysis, the enduring peace which is the hope of the world.

[88] *Ibid.*

[89] Borchard, *Enemy Private Property* (1924) 18 Am. J. Int. L. 523.

[90] Introduction to Gathings, International Law and American Treatment of Alien Enemy Property (1940) xiv.

[91] Dickinson, *Enemy-Owned Property: Restitution or Confiscation* (1943) 22 Foreign Affairs, 126, 141.

"INVIOLABILITY" OF ENEMY PRIVATE PROPERTY*

SEYMOUR J. RUBIN†

At the present time, the United States Alien Property Custodian has under his control, mostly "vested," some $180,000,000 worth of property of enemy aliens. The United States Treasury has blocked some $330,000,000 worth of the assets of enemy aliens.[1] There has been considerable discussion in recent months with regard to the ultimate disposition of these properties;[2] and the approaching end of the war brings closer the necessity for dealing with this question.

I

Article XXIII of the Treaty of 1799, between the United States and Prussia,[3] provided:

"If war should arise between the two contracting parties, the merchants of either country, then residing in the other shall be allowed to remain nine months, to collect their debts and settle their affairs, and may depart freely carrying off all their effects, without molestation or hindrance, and all women and children, scholars of every faculty, cultivators of the earth, artisans, manufacturers and fishermen, unarmed and inhabiting unfortified towns, villages, or places, and in general all others, whose occupations are for the common subsistence and benefit of mankind, shall be allowed to continue their respective employments, and shall not be molested in their persons, nor shall their houses or goods be burnt, or otherwise destroyed, nor their fields wasted by the armed force of the enemy, into whose power, by the events of war, they may happen to fall; but if anything is necessary to be taken from them for the use of such armed force, the same shall be paid for at a reasonable price."

The Treaty also provided:

". . . And it is declared, that neither the pretense, that war dissolves all treaties, nor any other whatever shall be considered as annulling or suspending this and the next preceding article; but on the contrary that the state of war is precisely that for which

* The views expressed herein are those of the writer, and should not be construed to represent the views of the Department of State, or of any other officer of that Department.

† A.B., 1935, University of Michigan; LL.B., 1938, LL.M., 1939, Harvard University. Member of the Illinois and District of Columbia Bars. Assistant Chief, Division of Financial and Monetary Affairs, Department of State. Contributor to legal periodicals.

[1] These are estimates. Exact figures are difficult to put together because of mixed interests in vested or blocked property, and similar obstacles.

[2] See, e.g., Dickinson, *Enemy Owned Property: Restitution or Confiscation* (1943) 22 FOREIGN AFFAIRS, 126; CHAMBER OF COMMERCE OF THE UNITED STATES, TREATMENT OF UNITED STATES PROPERTY IN ENEMY COUNTRIES (Sept., 1943). Bills dealing with the subject and sponsored by Representative Gearhart and Senator Glass have been introduced in Congress.

[3] 8 STAT. 174; 2 MALLOY, TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS AND AGREEMENTS BETWEEN THE UNITED STATES AND OTHER POWERS (1910) 1484.

they are provided, and during which they are to be as sacredly observed as the most acknowledged articles in the law of nature and nations."

During the last war, the Treaty of 1799 was considered to be abrogated because of German violation of the provision guaranteeing freedom of the seas.[4] There is no doubt, however, that many text writers on international law consider the rule of the Treaty to be also a rule of international law, binding upon nations at war without regard to specific treaty provisions.[5] Professor Borchard states:[6]

"Probably no rule of international law was regarded in 1914 as more firmly established than the rule that private property within the jurisdiction belonging to citizens of the enemy state is inviolable. The rule was not adopted in any burst of humanitarian sentiment, but was the evolution of centuries. It rests upon a sound development in political and legal theory which was deemed natural and incidental to the evolution of modern civilization, namely, a conviction as to the essential difference between private property and public property, between enemy-owned private property in one's own jurisdiction and in enemy territory, and between non-combatants and combatants, accompanied by the growing realization that the practice of confiscation was reciprocally unwisely destructive and inconsistent with economic common sense. Possibly also the natural law school of jurists in the eighteenth century were not without their influence in emphasizing the conviction, of mutual advantage, that those surviving the devastating effects of unmitigated war should have something left with which to take up again the thread of life."

Notwithstanding the "firmly established" rule of inviolability of enemy private property within the jurisdiction, the framers of the treaties of peace terminating the First World War made specific provision for the retention of such property, either directly as compensation for the claims of nationals of the Allied Nations, or as security for such claims. Article 297 of the Treaty of Versailles reserved to the Allied Powers "the right to retain and liquidate all the property rights and interests" belonging to German nationals in Allied territory. The proceeds were to be applied to certain claims of the Allied nationals against Germany. The surplus, if any, could either be applied against the reparation account or turned back, at the discretion of the individual country. Germany was required to compensate her own nationals for this loss of their property. Although the United States did not ratify the Treaty of Versailles, the Treaty of Berlin, by which the United States ended her war against Germany, contained substantially similar provisions.[7]

The practice after the last war thus made the property of enemy nationals within

[4] See 55 CONG. REC. 4926-4928 (1917). Article 282 of the Treaty of Versailles, the benefit of which was received by the United States in the Treaty of Berlin, definitely abrogated the Treaty of 1799 by not listing it among those considered by the contracting parties to be still in force.

[5] E.g., GATHINGS, INTERNATIONAL LAW AND AMERICAN TREATMENT OF ALIEN ENEMY PROPERTY (1940); 2 HYDE, INTERNATIONAL LAW (1922) 232 *et seq.* Other authorities are cited by both the above references.

[6] Borchard, *Enemy Private Property* (1924) 18 AM. J. INT. L. 523.

[7] The Treaty allowed the retention of the property of German nationals until such time as Germany should have made "suitable provision" for the satisfaction of American claims. See Vol. III of TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS AND AGREEMENTS BETWEEN THE UNITED STATES AND OTHER POWERS (1923) 2597 (SEN. DOC. No. 348, 67th Cong., 4th Sess.).

allied jurisdiction liable for the claims of allied nationals against Germany. This practice has been assailed as being a departure and a retrogression from a rule assertedly both firmly established and highly civilized. The explanation for this departure, and its implications for the future, will be the subject of this paper.

II

Ancient times recognized few, if any, distinctions between combatants and noncombatants, or private or other property. The rule was one of confiscation of enemy property both within and without the borders—a practice logical in view of the possibility that whole populations might be destroyed or enslaved. It is said that the Greek practice was based on the rule that "Those who in peace come to another nation, if war between the nations suddenly breaks out, become the slaves of those enemies among whom their destiny has thrown them."[8]

Modification of this harsh rule followed or accompanied the development of international trade. The Magna Carta contained a provision that enemy merchants and their goods should be unharmed until it were known how English merchants and their goods were being treated in the enemy country. Thereafter, from time to time, various countries adopted a practice, perhaps not dependent upon reciprocity, of allowing enemy merchants to depart with their goods in the event of war.

These developments, and the authorities cited for the proposition that the rule of immunity of enemy private property within the jurisdiction became a rule of international law, have been described fully elsewhere.[9] It is sufficient, for a study of modern practice and modern needs, to note here only two points:

1. The growth of international trade marked a strong modification of the ancient practice of seizure and enslavement. Just as the law of commercial instruments responded to new needs, so the practice of commerce-minded nations, responding to the pressure of the newly developed mercantile interests, changed in order to give protection to the new commerce. Had the situation been otherwise, international trade in a world full of extraordinary risks could hardly have been feasible. War was a more usual than unusual way of life among nations; and internationally-minded merchants, in a Europe which was in many respects a more closely-knit community than the Europe of the nineteenth and twentieth centuries, needed some assurance that their business would not be jeopardized by the struggles of princes over successions, territorial aspirations, and the like.[10] And, though the economic

[8] The historical background is treated in various writings. E.g., MOORE, INTERNATIONAL LAW AND SOME CURRENT ILLUSIONS (1924) *passim*.

[9] E.g., GATHINGS, *op. cit. supra* footnote 5, at 1 *et seq.*

[10] England, for example, engaged in the following wars between 1700 and 1850: War of the Spanish Succession, 1701-1713; War of Jenkins' Ear, 1739-1740; War with Spain, 1739-1748; War of the Austrian Succession, 1740-1748; French and Indian War, 1754-1760; Seven Years' War, 1756-1763; American Revolution and related wars, 1775-1783; Napoleonic Wars, 1773-1802, 1803-1814, April-June, 1815; War of 1812 as well as numerous campaigns in India, Burma, Afghanistan. It should be noted, however, lest this itemization indicate that pre-twentieth-century wars were casual affairs, that even old-fashioned warfare, unaided by gas, rocket bombs and similar devices for dealing out wholesale death, could affect peoples as well as princes. See MOORE, *op. cit. supra* footnote 8, at 1, 10, 12: "When the Thirty Years' War, which gradually embroiled the continent of Europe, opened in 1618, the population

basis of the war-making power was as clear then as now, investments in the enemy country were less likely then to strengthen materially that economic foundation of the power to wage war.

2. The rules of international law are often expressions of hope as well as statements of history. The transmutation of the asserted rule from the practice of one or of several nations, undertaken independently or by bilateral treaty, into a rule of international law, binding upon all countries regardless of treaty or local action, is an obscure process in a field characterized by no mathematical preciseness. It seems clear that many nations from time to time thought it best in particular situations to be lenient with enemy merchants or enemy private property within their jurisdictions. But bilateral and cautiously reciprocal treaties as, for example, the Treaty of 1799 with Prussia would seem to be different from rules of law having universal application. The transition from a policy, generally recognized as desirable, which might be applied or rejected, to a rule which binds without regard to national discretion is the point at which the analysis of several writers on the subject is most unsatisfactory. One writer states, for example: "Since nations express policies through treaties and since treaties constitute one of the sources of international law, it would appear that during these centuries the countries of the world recognized that private property of aliens within their jurisdiction should be protected during war."[11] But the policy expressed in the treaties was one of reciprocity; and it would seem logical that the derivative rule of international law was also one based either upon reciprocity, or, where a nation chose to make such a rule for itself without regard to its enemy's action, upon the free choice of the nation concerned. A policy of protection upon certain prerequisites (reciprocity) can hardly be stated to be an unconditional rule of protection, regardless of prerequisites, especially if the new rule is asserted to be merely a codification of the previously stated policy.

Especially does the asserted rule of international law, binding on all nations, become doubtful when courts fail to recognize the asserted rule, and when the practice of nations contains so many violations that it may be questioned whether the violation is not itself the rule.[12] The English courts have said that: "If the property appears to be in the Crown, it becomes a case of generosity whether the Crown will take advantage of that *summum jus* which undoubtedly gives all enemies' property coming into this kingdom to the King, or whether in this, a case of calam-

of the old German Empire was between 16 and 17 millions; in 1648, when it closed, the population was about 4,000,000. . . . In the brief but culminating Russian Campaign, in 1812, in spite of the previous twenty lugubrious and exhausting years, more than a million men confronted one another in battle. Of these more than a half perished." But compare the words of former Secretary of State Lansing: "In the past . . . the non-combatants of the populations have formed a class which was without military value and which was on that account free from hostile attack. . . . This Great War has been a war of peoples, and not a war of armies and navies alone." Lansing, *Some Legal Questions of the Peace Conference* (1919) 44 AM. BAR ASS'N REP. 238, 245.

[11] GATHINGS, *op. cit. supra* footnote 5, at 5.

[12] This is not to say that violations of international law negate the existence of rules of international law. But in a field built largely upon customs and usage, the establishment of widespread "violations" may bring into question the very existence of the "rule."

ity, it shall be restored to the owner."[13] In *Ware v. Hylton*,[14] Mr. Justice Chase, speaking for the Supreme Court of the United States, said: "It appears to me that every nation at war with another is justifiable, by the general and strict law of nations, to seize and confiscate all movable property of its enemy (of any kind or nature whatsoever) wherever found, whether within its territory or not." In dealing with the question under international law, the consistent doctrine of the Supreme Court has been that any inviolability which might be granted to enemy private property within the jurisdiction was due merely, as Lord Mansfield had said, to the generosity of the sovereign.[15]

On the side of practice,[16] enemy private property was taken by some of the states during the Revolutionary War, pursuant to recommendations of the Continental Congress; property was taken over during the Civil War and again after World War I. In each case some arrangements for return of at least part were made: In the case of the Revolutionary War by the Treaty of Paris and the Jay Treaty, and in the case of World War I by various acts of Congress. Restraint appears to have been practiced during the Wars of 1812, 1848, and 1898. In view of the strong holdings of the Supreme Court, the nonconfiscation of enemy private property can hardly be considered proof of the existence of a binding rule. Restraint was equally consistent with the existence either of such a rule, or of the doctrine asserted by the Court, that the country could exercise restraint or not, as it chose. On the other hand, the instances of taking over enemy property were at variance with the asserted rule, but consistent with the Court's doctrine. Practice in the United States (and in other countries as well), thus seems based upon the theory: (1) that no rule existed except that of the right of the sovereign to deal with enemy private property as the sovereign willed; and (2) a recognition that it might be desirable, for many reasons, to give a measure of immunity to enemy private property.

Adequate analysis of the treatment of enemy private property depends upon

[13] Lord Mansfield in Land v. North, 4 Doug. 266, 274 (1785). But cf. Wolff v. Oxholm, 6 Mau. & Sel. 91 (1817), in which the English courts refused to recognize the discharge of a debt to a British subject by payment made by the Danish debtor to a Danish enemy property commission, during war between England and Denmark.

[14] 3 Dall. 199 (U. S. 1796). No attempt to list the American cases is made here. Representative cases are: Brown v. United States, 8 Cranch 110 (U. S. 1814); United States v. Percheman, 7 Pet. 51 (U. S. 1833); Stoehr v. Wallace, 255 U. S. 239 (1920); United States v. Chemical Foundation, Inc., 272 U. S. 1 (1926).

[15] See Turlington, *Treatment of Enemy Private Property in the United States Before the World War* (1928) 22 AM. J. INT. L. 270; but cf. Borchard, *Treatment of Enemy Private Property in the United States Before the World War* (1928) 22 AM. J. INT. L. 636. The assertion of Borchard that the political as well as the legal branch of government makes international law seems clearly correct, but has a somewhat misty relevance to a problem in which neither the executive nor the legislative branch has exercised what may be its power to establish doctrine other than that previously followed by the judicial branch. Supreme Court doctrine, of course, recognizes the policy-making function of the political branch in this field; and follows somewhat reluctantly, rather than leads, when the taking over of private enemy property is in question. Cf. Brown v. United States, 8 Cranch. 110 (U. S. 1814).

[16] A résumé is given in GATHINGS, *op. cit. supra* footnote 5. Previous practice, however, is variously pictured. Precedent in this situation seems to lie principally in the eye of the beholder. Contrast the interpretations of Turlington and Borchard (1928) 22 AM. J. INT. L. 270; (1924) 18 AM. J. INT. L. 523.

separation of two problems which are often merged under the general term "treatment": administration of the property during time of war; and disposition of the property (or its proceeds) after the war.

III

Substantial expert opinion holds that international law sanctions or should sanction the use during war of enemy private property in a manner consistent with the wartime needs of the nation.[17] The necessity for such use is hardly deniable. The annual report of the Alien Property Custodian for 1919 stated that: "When the armistice was signed the Alien Property Custodian was supplying the Government with magnetos for aeroplane and automobile motors, with cloth to make uniforms for soldiers and the dyes with which the cloth was dyed, with medicines, surgical instruments and dressings, with musical instruments, with ball bearings, telescopes, optical instruments and engineering instruments, with cocoanut charcoal for the making of gas masks, with glycerin for the making of high explosives, and a large number of other varied products." A similar situation obtains in this war. The Custodian controls General Aniline & Film Corporation, one of the largest concerns in the country in both the dye and film fields; Schering Corporation, an important pharmaceutical company; and substantial interests in other industrial concerns. It is property of this sort that is meant when the necessity is conceded of "sequestrating certain kinds of enemy property—not necessarily all—during the period of hostilities and turning it over to Americans for use and management."[18] On the other hand, Gathings submits that "the rules of international law must be modified to permit a state to sequestrate private property of enemies or allies of enemies when it goes to war,"[19] and thus implies that even the right of sequestration does not now exist.

A second phase of administration, shading off perhaps into questions of ultimate disposition, arises when sale of property "vested" by the Custodian is made. Such assets as bank credits, securities in safe deposit vaults, and the like are, in general, merely blocked by the Treasury Department, and no question of sale at the behest of the government need arise. However, a going concern requires management. It is the view of the Custodian that efficient management of an ordinary industrial concern may best be found in private enterprise, which will have the ability to expand the business, to increase its capital, and to take other decisions from which the Custodian would be barred. The Custodian, therefore, may be expected to and often does sell business enterprises to which he holds title. Such sales are defended as measures of conservation by the Custodian, but attacked by some as wasteful and destructive spoliation of the assets of the enemy national. It has been stated that "the good name of the United States was used by an admin-

[17] E.g., MOORE, *op. cit. supra* footnote 8, at 22. For discussion of the acquisition of enemy private property within the context of wartime acquisitions generally, see U. S. DEP'T OF JUSTICE, ACQUISITION OF PROPERTY FOR WAR PURPOSES (1944) 84 *et seq.*

[18] Dickinson, *Enemy-Owned Property: Restitution or Confiscation* (1943) 22 FOREIGN AFFAIRS 126.

[19] MOORE, *op. cit. supra* footnote 8, at 22.

istrative officer, contrary to the will of Congress, in order practically to despoil the property held in trust."[20] On the other hand, the Custodian's report for 1942-43 states that: "The decision to transfer vested properties to private enterprise has been adopted because of the generally accepted advantages of private management. . . . Continued administration of vested properties would involve this Office not only in the selection of management but in continued evaluation of its accomplishments. . . . Activities of this character are foreign to the effective operation of the Custodian's Office as an agency of the Government."[21]

These problems, though troublesome, are relatively minor. The sequestration of at least certain types of enemy private property is probably lawful even under the most stringent rule of international law; it is certainly sanctioned by precedent; and it is argued even by those who do not concede the right to be presently granted by international law that the right should be granted—perhaps with damages to be paid to the enemy owner for any harm or loss. The sale and liquidation of property under his control is as necessary for the Custodian as it is for a trustee, or for a court of bankruptcy; the "despoliation" of enemy assets relates chiefly to the failure to convert one asset into an economically equivalent substitute. The important questions in the administration of enemy private property arise from the policy followed by the present Custodian and the Custodian of the last war—the policy of "Americanization" of properties under their control.

This policy of "Americanization" of the properties (meaning in general their sale to American citizens of proved loyalty and having no previous ties with the former enemy owner) has been violently assailed as being outside the proper sphere of a Custodian's activities, and as being a violation of the Congressional intent that the properties confided to his care be held in trust for the former owners.[22] The 1919 report of the Custodian stated that certain German investments in this country were "in a sense hostile. They constituted Germany's great industrial army on American soil. . . . In many cases the factories, warehouses and offices of enemy-owned concerns were mere spy centers before America entered the world war, and would have been nests of sedition if the Alien Property Custodian had not acted promptly in their seizure. As to these no obligation is owed to their private owners to conserve or care for them with a view of ever returning them in kind."[23]

Gathings characterizes "this most amazing statement" as "almost . . . without explanation. The Custodian seemed to think it was his duty to punish the individuals whose property he had seized by Americanizing it. . . . On his own authority the Custodian determined that he should not be a mere conservator, but that

[20] See BORCHARD, INTRODUCTION TO GATHINGS, INTERNATIONAL LAW AND AMERICAN TREATMENT OF ALIEN ENEMY PROPERTY (1940) *op. cit. supra* footnote 6, at 5.

[21] ANNUAL REPORT OF ALIEN PROPERTY CUSTODIAN 1942-1943, 69.

[22] E.g., MOORE, *op. cit. supra* footnote 8.

[23] ANNUAL REPORT OF ALIEN PROPERTY CUSTODIAN 1918-1919, 13. In time of peace, this statement seems somewhat flamboyant. But the most flamboyant fears of wartime have sometimes proved amply justified; and abundance of caution is a rule that commends itself highly to a nation engaged in a war of the scope which the present century has brought.

he should use the property in his hands as a fighting force against the enemy. The conclusion must be that the act was not administered as Congress had intended."[24]

The question of what Congress intended cannot be given any clear answer. Congress may, in fact, be argued to have ratified the Custodian's policies by assent. In any case, it is a curious logic to concede that enemy private property may or should be sequestrated and put to use for production, in the interests of the state, but that it may not be used "as a fighting force against the enemy." Property within the jurisdiction is properly used in the interests of carrying on the war; and it would be a strange rule that would protect enemy industrial property from such governmental policies as are necessary to put it to full use while at the same time granting to Government sweeping powers, including that of requisition, over similar property of citizens.

Enemy private property may, in many instances, be used during time of war without the necessity arising for Americanization in the sense of transferring the property permanently to American ownership.[25] Thus, in the present war, few important industrial properties have been disposed of by the Custodian. But the uses to which these properties have been put makes it highly unlikely that—regardless of disposition of their proceeds—these businesses will ever be returned to their former enemy owners. The companies have been developed and have been given access to important American wartime developments, on the theory that they were to be a part of the American-owned post-war industrial structure. Moreover, these companies have deliberately been used "as a fighting force" in Latin America, where, having been freed by the Custodian of their previous contractual restraints, they have, as American companies, competed with their previously enemy sister companies. The United States was committed to such a program by the necessity of waging economic warfare against both enemy trade with Latin America and enemy-owned companies, sponsors of enemy propaganda and more dangerous activities, in Latin America. The consequence of this wartime necessity was use of former enemy companies in the United States; and full and effective use of their competition against sister enemy-owned Latin-American firms was difficult or impossible unless it were understood that the companies themselves were not to be returned. Emphasis on the American nature of these competing companies was, as a matter of fact, necessary for the obtaining of cooperation by Latin-American consumers, as well as governments, in an effort directed against concerns whose

[24] GATHINGS, *op. cit. supra* footnote 5, at 82, 85.

[25] In PATENTS AT WORK (U. S. Alien Property Custodian, 1943), the Custodian stated that Americanization of patents would be necessary. Irrespective of confiscation of other property, special treatment of patents would seem indicated from the fact that patents cannot be exploited without investment and that investment will be made only on the basis of long-term licenses or other assurance that the licensee will not have the basis of his investment destroyed. Cf. GARNER, INTERNATIONAL LAW AND THE WORLD WAR (1920) 106 ff. It will be noted that under British patent laws (as distinguished from emergency custodial legislation) any patent not being adequately exploited can be licensed. The question of fees for such licenses, whether under British or American law is another matter; here the Custodian's argument would seem to be that exploitation of enemy patents should not be held up pending license fee discussions. See Sargeant and Creamer, *Enemy Patents,* in this symposium, *supra* p. 92 *et seq.*

enemy nature was being emphasized. Should return of these "American" companies be effected, the United States would return to the former enemy owner vastly increased exporting companies, in place of a smaller non-exporting companies;[26] the properties would have been vastly increased by reason of strenuous American efforts—not in line with ordinary "trusteeship" functions; and the former enemy would find that his grip on the Latin-American market had been greatly strengthened for him, by American efforts, and largely at the expense of other American companies which might have absorbed part of the market lost by reason of the enemy blockade. These considerations, to say nothing of the effect of such a step on other American republics whose policies have been formulated on the basis of confidence that these companies were American and that the United States intended to carry out its Inter-American commitments on elimination of enemy influence,[27] put a return of these particular properties beyond the realm of probability, and certainly beyond the sphere of desirable United States foreign policy. Disposition of proceeds, of course, is another matter.

IV

Putting to one side the asserted compulsion of a rule of international law, arguments may be made on both sides of the question whether enemy private property should be returned.[28] On the affirmative, it is said that a policy of return or "inviolability" is civilized and a mark of civilization; that it leaves private citizens of enemy nations something with which to take up once more the thread of life; that the enemy national should not be identified with his government; that a nation in throwing open its ports and territories to foreign commerce in effect invites aliens to do business within its borders, and therefore promises that their property within those borders will be protected; and that a policy of reciprocal protection is one which leads to the development of international trade, and, even apart from humanitarian sentiments, should commend itself especially from the viewpoint of enlightened self-interest to the United States, with its vast foreign investments.[29]

[26] American affiliates of, or parties to contracts with, German companies were generally restricted to the United States (and sometimes the Caribbean market). Note, for example, the allegation in the complaint filed by the Department of Justice against Merck & Co., alleging a "Treaty" with Merck of Darmstadt, Germany.

[27] These commitments are chiefly embodied in resolutions adopted at certain hemispheric conferences. See REPORT ON THE THIRD MEETING OF MINISTERS OF FOREIGN AFFAIRS OF THE AMERICAN REPUBLICS, Rio de Janeiro, Jan., 1942 (Pan American Union) Resolution V, p. 38; FINAL ACT OF THE INTER-AMERICAN CONFERENCE ON SYSTEMS OF ECONOMIC AND FINANCIAL CONTROL, Washington, June-July, 1942 (Pan American Union). For comments upon these resolutions, see Domke, *Western Hemisphere Controls Over Enemy Property*, *supra* in this symposium, p. 3, at p. 5 *et seq.*

[28] The question is sometimes stated as that of "confiscation" or not—an unfortunate phrasing because the invidious connotations of the word "confiscation" mean generally that the answer has been assumed in the statement of the problem.

[29] Apparently this assumption lies behind the report, TREATMENT OF UNITED STATES PROPERTY IN ENEMY COUNTRIES, *supra* footnote 2, approved by the Board of Directors of the Chamber of Commerce of the United States (Sept., 1943). The report states: "The Foreign Commerce Department Committee wishes to emphasize the importance of the policy of keeping enemy private property in time of war immune from confiscation as a precedent in relation to enemy treatment of United States property overseas." In terms of the present war, and present enemies, the value of good example seems to the author somewhat small.

On the other hand, it may persuasively be argued that modern, perhaps unfortunate, tendencies have tended to break down the distinction between combatant and noncombatant, and between state and private property, in time of war. A full discussion of these broad issues is not within the scope of this paper. But on the much more narrow issue of the responsibility of foreign private investment to pay reparation, the rationale for the distinction between enemy private and enemy public assets limps heavily in a world of rigorous state controls over foreign investment, of exchange controls, and, as in Germany since the early 1930's, of complete power to requisition such investment. Since early days, foreign traders have been involved in the affairs of their governments; modern tendencies seem to be to increase that involvement, so that, for governmental purposes, at least in the European states, the line between foreign private and public investment is vague and not always meaningful.[30] The application of this point with special cogency to Germany seems clear.

That there is an implied promise of immunity in extending permission to aliens to do business within the country would seem hardly plausible as a matter of fact at this date. Whatever there may have been in the notion when it was put forward by Hamilton,[31] since then aliens coming into the United States have been amply warned—certainly by judicial decisions from Revolutionary days, and by our practice during and after the first World War—that this country recognized no obligation to treat their property except as it saw fit, should they become enemies. That they have recognized this risk is shown concretely by the trust and other devices which have been used to cloak alien ownership or to insulate the foreign owner from risk of seizure by American custodial authorities. Moreover, the "thread of life" argument works both ways; it may be argued that a government, impoverished by years of war, should compensate those of its nationals who have lost through enemy acts, and should use for that purpose enemy property within its borders. Given the justice of a reparation demand at all, it would seem that as between the citizen who has lost his home in a bombing raid and an enemy who has property within the borders, the citizen should have first claim on whatever is available for reconstruction and for making a fresh start. The issue is really whether the foreign investments of enemy nationals, located in the victor state, should be retained by those enemy nationals or should be used to pay, in part, a reparation claim which (it seems not to be contested) may be justly demanded.[32]

The argument that international trade will be hampered if business men realize that their property abroad is subject to seizure and to being held liable for acts of

[30] See KEYNES, THE ECONOMIC CONSEQUENCES OF THE PEACE (1920) 65, 66: ". . . the sharp distinction . . . between the property and rights of a State and the property and rights of its nationals is an artificial one, which is being rapidly put out of date by many other influences than the Peace Treaty, and is inappropriate to modern socialistic conceptions of the relations between the State and its citizens."

[31] WORKS OF ALEXANDER HAMILTON (Lodge ed., 1904) 405-421.

[32] But cf. 2 HYDE, INTERNATIONAL LAW (1922) 240. It should be noted that the term "reparation" is used in this article broadly to mean such claims as the United States may have against Germany, and not in a narrow or restrictive sense.

their government, is perhaps balanced by the contention that this realization will bring the business community to work actively for the preservation of peace, and against those acts of their government which might provoke war. The desirability may seriously be questioned of assuring the business community that it need feel no responsibility for the acts of government—that, come war or peace, its investments will be safe—one of the very few things inviolable and apart from the general risks of global warfare.[33] Furthermore, the assurance of the immunity of private enemy property would suggest to the enemy various ingenious devices that would enable it to cash in during the war on American-held assets, to the detriment of the American war effort.

It should be emphasized, too, that American practice has made[34] and probably will make a distinction between enemy foreign investments and property of enemy nationals domiciled in the United States. It is the latter class of person, in any case, who seems most analogous to "the merchants of either country, then residing in the other" who under the Treaty of 1799 with Prussia were to be "allowed to remain nine months, to collect their debts and settle their affairs, and . . . depart freely. . . ."[35] The Treaty of 1799, contemplating as it does the eviction of resident enemy merchants, is perhaps harsher than present practice; but both the Treaty and present practice seem to treat leniently the resident enemy alien and his property—to whom the argument for inviolability applies most strongly, on both economic and humanitarian grounds[36]—and to treat as liable for the war debts of their country chiefly the foreign investments of nonresident (in the United States) enemy nationals.

The question may also be raised as to the conclusions which are dictated by enlightened self-interest. So far as this war and American foreign investments are concerned, two things seem certain: (1) that the Allies will win the war, and therefore need not fear what the Axis might have done; (2) that if the Axis were to win, in view of the philosophies, economic, political and moral, of the fascist states, they would do as they pleased with Allied investments. Nor is there reason to believe that they would have been more respectful of Allied foreign investment than they have been of the property—and lives—of nationals of occupied nations. So far as the long-range situation is relevant, it is not cynicism to put more trust in plans for the preservation of peace than in any example which present conduct might set to a hypothetical future victor. Moreover, it would seem unlikely that United States action with respect to enemy-owned property, in connection with a settlement which would be part of a treaty of peace terminating a war, would influence in any substantial degree possible tendencies toward expropriation of foreign-

[33] Compare views of Mr. Claude Mullins, *Private Enemy Property* (1923) 8 TRANSACTIONS OF THE GROTIUS SOCIETY 89, with those of Borchard, *op. cit. supra* footnote 6.

[34] GARNER, INTERNATIONAL LAW AND THE WORLD WAR (1920) 105: "It does not in fact appear that the property of any German subject residing in the United States, or not actually engaged in making war against the United States or not interned, was seized or sold."

[35] HAYS, ENEMY PROPERTY IN AMERICA (1923) 67.

[36] It should be pointed out, however, that in the somewhat analogous case of private enemy property in ceded territory, such property was subjected to Allied claims by the Versailles Treaty (Article 297(b)).

owned property in Allied or neutral countries, or toward disrespect for the rights of American property holders in such countries.

The argument is made, finally, that the taking of enemy private assets distributes unfairly the burden of what are really reparation payments, which should be met by the body of the enemy people rather than by an unlucky group of those holding foreign investments.[37] On the other hand, it is urged that such provisions as those contained in the Treaty of Versailles, requiring Germany to compensate its nationals, invalidate the argument of unfair distribution of burden.[38] The rejoinder is the contention that the defeated power has not the resources to make payment to her nationals;[39] to which the reply is that the question of compensation of her nationals and distribution of the burden is one which the defeated country can handle if she will; that is, it is a problem merely of redistribution of wealth within a country. It cannot be argued that the defeated state is unable to distribute the burden of loss of foreign assets equitably, though it may be unwilling to take the tax or other measures necessary to do so.

V

A strong and affirmative reason for the use of enemy assets in the United States to secure or to pay American claims against enemy governments may be found in the existence of two conditions which may well be determinative: (1) the fact that the present war has constituted a tremendous drain upon the foreign assets of all of the Allied governments; and (2) the fact that the enemy countries will almost certainly be in a position analogous to that of a bankrupt against whom claims are being filed in an amount greatly in excess of the bankrupt's assets.

The first consideration becomes relevant and important when it is considered what the relative position would be of an Allied and an enemy government if enemy private foreign holdings (in the United States, in particular) were to be returned. It is well known that in many cases Allied governments have had to liquidate the foreign holdings not only of those governments directly (public property) but also the foreign holdings of their nationals. In order to acquire war materials and other vital necessities in the United States, the British, for example, have for several years taken steps to bring the private United States holdings of British nationals under government control. In many cases these foreign holdings have been liquidated by the British, and, similarly, by other governments, in order to obtain needed foreign exchange to finance British governmental or other war requirements. British foreign investment in the United States and in other countries, which in the past has accounted for a substantial share of the national income, has thus been liquidated, and the foreign exchange thus obtained has been spent for the prosecution of the war.

[37] See Dickinson, *op. cit. supra* footnote 18, at 141.

[38] Bouvé, *The Confiscation of Alien Property* (1926) PROC. OF AM. SOC. INT. L. 14.

[39] Borchard, *op. cit. supra* footnote 6, at 526-527. But see Armstrong, *The Confiscation Myth* (1923) 9 A. B. A. J. 484, 488: "We are asked to prevent Germany from breaking its solemn word to compensate its own citizens, by paying them ourselves. . . ."

It has, of course, been impossible since the imposition of freezing controls in the United States for enemy governments to take any similar action, either with respect to their public property or with respect to the private holdings of their nationals. These private holdings therefore constitute a considerable block of investment in American industries. Return of these investments to their enemy owners, if there were no compulsion on the enemy government to use these for war charges, would result, therefore, in the more than curious situation that the British and other Allied countries and their nationals, having expended these "private" holdings for war purposes, would have permanently lost a substantial portion of their foreign investments and sources of foreign exchange, particularly in the United States; whereas a former enemy country would have available to it large foreign investments and sources of foreign exchange which would, of necessity, if the return is to be meaningful, be free from the compulsion of responding to war charges. When the traditional dependence of the British economy on foreign investments is recalled, as contrasted with the place of such investments in such an economy as the German, the situation becomes even more anomalous. In a very real sense it might be argued that the consequence of a return of enemy investment would be to require the Allies to pay for the preservation of the German foreign asset position.

It has already been pointed out that these foreign investments of enemy (as well as other) nationals have lost to a considerable extent their purely private nature in view of foreign exchange and similar controls which have uniformly been applied by the European countries. Clearing balances and related arrangements emphasize the fact that foreign private investments have, in the case of almost all countries except some of the Western Hemisphere, been dealt with as assets of the nation,[40] at least for the purposes of providing necessary foreign exchange by the nations having jurisdiction over the national who owned the foreign investment.

In this connection a memorandum on treatment of private property prepared by the Allied powers during the negotiations leading toward the Treaty of Versailles is particularly pertinent. That memorandum discusses the German delegation's notes of May 22 and 29, 1919, among which was the following objection to the proposed "Conditions of Peace": "(a) It is not legitimate to use the private property of German nationals to meet the obligations of Germany." To this the Allied and Associated Powers replied as follows:

"(a) As regards the first objection, they [the Allied and Associated Powers] would call attention to the clear acknowledgment by Germany of a pecuniary obligation to the Allied and Associated Powers, and to the further circumstance that the immediate resources of Germany are not adequate to meet that obligation. It is the clear duty of

[40] This is not to say that the extraterritorial effect of expropriation or similar decrees will inevitably be recognized. Cf. United States v. Belmont, 301 U. S. 324 (1937); United States v. Pink, 315 U. S. 203 (1942). It should be noted, however, that in most cases the government having jurisdiction over its national (and the bulk of his property) will encounter little practical difficulty in controlling his foreign assets. Cf. N. Y. Times, Jan. 11, 1945, p. 2: "France May Draft Foreign Holdings."

Germany to meet the admitted obligation as fully and as promptly as possible and to that end to make use of all available means. The foreign investments of German nationals constitute a class of assets which are readily available. To these investments the treaty simply requires Germany to make prompt resort.

"It is true that, as a general principle, a country should endeavour to avoid making use of the property of a part of its nationals to meet state obligations; but conditions may arise when such a course becomes necessary. In the present war Allied Powers themselves have found it necessary to take over foreign investments of their nationals to meet foreign obligations, and have given their own domestic obligations to the nationals who have been thus called upon to take a share, by this use of their private property, in meeting the obligations of the state.

"The time has arrived when Germany must do what she has forced her opponents to do. The necessity for the adoption of this course by Germany is clearly understood by the German peace delegates, and is accepted by them in the following passage, quoted textually from their note of the 22nd of May:

> "'The German peace delegation is conscious of the fact that under the pressure of the burden arising from the peace treaty on the whole future of German economic life, German property in foreign countries cannot be maintained to its previous extent. On the contrary, Germany, in order to meet her pecuniary obligations, will have to sacrifice this property abroad in wide measure. She is prepared to do so.'

"The fundamental objection mentioned above is completely answered by the note itself."[41]

The second compelling present consideration, mentioned in the Allied memorandum above quoted, is the necessity of marshalling enemy foreign assets in order that the enemy countries may make payment on their reparation or other debts. In the past, when the reparation claim against a defeated nation could be raised and paid by that nation itself within a relatively brief period, there was no reason to do anything other than return enemy private assets located abroad. In the last great war before World War I, the Franco-Prussian War of 1870-1871, the unprecedented reparation imposed upon France by Bismarck was raised and paid in a few years. The nation claiming reparation, therefore, was in the position of a creditor taking the unsecured note of a solvent debtor. The present situation, however, is different. The legitimate claims of the Allied nations against the enemy at the conclusion of the present war will be many times in excess of any conceivable assets which the enemy will have available for payments, even over a considerable period of years. The Allies, after scaling down their claims by a very large percentage to reflect a realistic estimate of the enemy capacity to pay, can hardly be expected to return to that enemy one of the chief assets, and perhaps the only large quick asset, which the enemy has available for the payment of its just debts, or, at least, for pledge as security for such payment.[42]

[41] Cited in BARUCH, THE MAKING OF THE ECONOMIC AND REPARATION SECTIONS OF THE TREATY (1920) 338 *et seq.*

[42] Several problems involved in such use of enemy private property have, as is apparent, not been treated in this discussion of the basic issue: (a) In view of the ideological nature of the present war, the foreign property of certain "enemies"—refugees, underground fighters, etc., might be exempted; (b) the manner in which enemy property should be applied to Allied claims would need study; (c)

Consideration of this problem in terms of actual consequences underlines the anomaly of free return of enemy foreign holdings. For it is clear that such a return would mean Allied payment to the enemy to preserve the foreign holdings of enemy nationals, and would mean asking the Allied taxpayer to dig deeper into his pocket in order that the return might be made. The United States, like all of the Allies, will have large expenses arising from the war—pensions, interest charges, etc. These obligations must be met. The funds to meet these obligations will come chiefly from taxation, but they may come partially from the former enemy. It may be recognized, without impairing the force of this statement, that total enemy assets in the United States do not bulk over-large as compared with a wartime American budget. The question is still, however, whether that budget will reflect the available dollars which might be contributed by the former enemy. If the United States holdings of the enemy are considered to be "inviolable," the enemy capacity to pay will be decreased by that much; and the decrease, whatever it is, will be reflected in increased American taxes—or in diminished provision for these obligations. An international law obligation which would thus force the American taxpayer to finance the retention of enemy foreign holdings would seem neither just nor desirable.

The above considerations lead also to the conclusion that it would probably be futile to return enemy private property, and would be merely, so far as the enemy national was concerned, a postponement of the day on which he would lose his dollar holdings and receive marks or yen. It is clear that the reparation demand will be based upon the ability of the enemy nation as a whole to make the requisite payments over whatever period may be eventually determined upon for reparation. In calculating the wealth of the enemy nation, its foreign investments will bulk large, especially since cash payments will depend upon foreign exchange, and such assets will constitute a large, quick source of foreign exchange or the equivalent.[43] Even, therefore, should the foreign holdings of enemy nationals be returned to them, their own government would inevitably be faced with the necessity of taking steps (either expropriation or foreign exchange controls) to meet such foreign exchange obligations of that government as reparation debts and to make available foreign exchange for other requisite governmental purposes. Germany, for example, would, by the economic, if not the legal, necessities of the reparation settlement, be forced to liquidate or pledge the foreign holdings of German nationals in order to provide foreign exchange for governmental commitments, either connected with reparation or connected with import-export requirements. Presumably, Germany would compensate its nationals in marks[44]—a step very similar to the procedures of the clearing bal-

whether the Allies shall require the enemy countries to compensate their nationals is perhaps open for discussion; (d) how best to deal with the foreign holdings of enemy nationals who have escaped the enemy jurisdiction may be a problem. These are all, though important, subordinate to the main issue of disposition of enemy private property.

[43] See KEYNES, A REVISION OF THE TREATY (1922) pp. 77-78.

[44] It may be appropriate to note once more at this point that such compensation can be made if Germany so desires. In other words, the burden of loss of foreign holdings can be distributed by taxation and other measures designed to spread the loss throughout the nation. No answer to this point is

ance technique generally used in Europe, and almost identical with measures already taken by such nations as Great Britain. From the viewpoint of the German national having foreign holdings, therefore, there would seem to be little to be gained by a return of the properties, since those holdings would then be expropriated by the German government, liquidated or pledged in order to obtain foreign exchange for governmental requirements, and compensation would be paid in German currency. Given the assumption that capacity to pay will be measured by all, rather than less than all, of enemy industrial and other holdings, at home or abroad, the concept of the clean, unconditional return of enemy private property, which would then be held by the owner free from interference either by his own government or the government of the country in which the property was located, has thus a somewhat antiquarian and obsolete flavor.

It may, of course, be urged that the technique of return and later expropriation by the owner's government would be preferable, because of its formal recognition of an international law obligation to return enemy private property. The recognition is so obviously only formal, however, that it might appear hypocritical to make the return while at the same time obligations were laid upon the enemy government which would make the return purely illusory. The political question may also be argued as to whether one technique or the other would be more desirable, with arguments on both sides. But the decision between the two techniques is relatively unimportant. The important and compelling consideration is that no country at the present time considers the foreign investments of its nationals to have a purely private nature, least of all the governments of our present enemies; that each government exerts to some extent jurisdiction over these foreign assets for governmental purposes, and directs the use of the foreign exchange represented by the foreign investments; that Allied governments have been forced to ask their nationals to liquidate foreign investments for wartime purposes; and that no reason exists why enemy countries should escape this equal obligation and should emerge from this war with substantial foreign holdings, while at the same time Allied claims against those governments are scaled down to the extent necessary not only to recognize the impoverished condition of these enemy countries, but also to protect them from the necessity of utilizing their foreign investments.

So stated, the issue becomes one not of whether enemy private property should be confiscated, but of whether enemy nationals are to be accorded more favorable treatment than Allied nationals, and enemy nations than Allied nations; and whether enemy nationals are to retain substantial foreign assets, while at the same time the plea of poverty is used to defeat the justifiable claims of Allied governments acting on behalf of their nationals. The terms, "confiscation," "private enemy property" and similar phraseology are therefore anachronistic and inappropriate,

made by those who advocate return on the ground that reimbursement to the enemy nationals by their own government will be unsatisfactory. See Cohen, *The Obligation of the United States to Return Enemy Alien Property* (1921) 21 COL. L. REV. 666, 678.

as well as misleading, for a discussion of the basic issue—namely, what shall be the foreign asset position of a defeated enemy country and its nationals, particularly in relation to the foreign asset position of the Allies and their nationals; and whether the tax burden of Allied nationals shall be increased, or Allied provisions for obligations arising from war be decreased, in order to permit enemy nationals to regain their foreign holdings. It is suggested that the answer is clear and that the conclusion is compelling that enemy property assets should, not only for reasons of expediency, but also for reasons of justice, be utilized for the payment or the securing of the enemy's reparation or similar debts.

POST-WAR PROSPECTS FOR TREATMENT OF ENEMY PROPERTY

BERTRAND W. GEARHART*

When I came to Congress in January of 1935, the subject of alien property seemed one of ancient history, never to be heard of again. Upon the outbreak of the present war, interest in it was suddenly revived, so emphatically that I felt it my duty as a Representative in Congress to inform myself about it. From study and contacts with persons whom I regarded as informed, including publicists and lawyers who had participated in legislation and litigation related to the subject, I became convinced of several things, among them these: First, that it was a vastly important subject of national concern and hardly less complicated than it was important; second, that we had blundered in our treatment of it during and after the last war; and, third, that there were certain things to be done about it without delay and at this session of Congress.

Accordingly, on November 15, 1943, I introduced a bill, H. R. 3672, referred in due course to the Committee on Interstate and Foreign Commerce, which, together with one of my own committees, Ways and Means, had framed the legislation after the last war, known as the Settlement of War Claims Act of 1928.[1] Several other bills have subsequently been introduced.[2] Hearings on some of these bills have begun. In the meantime, the views and comments of interested government departments and executive agencies have been received as to my bill, among them the Alien Property Custodian, the Attorney General, the Acting Secretary of the Treasury and the Secretaries of State, War, Navy and Commerce Departments.

The chief outspoken opposition that I have heard since I introduced H. R. 3672, comes from three sources. It might be well to consider them briefly.

Two months prior to the introduction of my bill, and, no doubt, in anticipation of it, the Foreign Commerce Department of the Chamber of Commerce of the United States made a report to its Board of Directors, the gist of which was contained in these words:

* LL.B., 1914, University of Southern California. Member of the Bar of California and Bar of the U. S. Supreme Court. Member of Congress, 9th District of California, since 1935. Author of the Gearhart Bill, H. R. 3672, 78th Cong., 1st Sess., 1943, relating to enemy property and claims.

[1] 45 STAT. 254 (1928), 50 U. S. C. APP. (1940 ed.) §§9(b)(12) to 9(b)(22) inc. and 9(l) to 9(q) inc.

[2] S. 1940 and H. R. 4840 (same bill) May 19, 1944; S. 2038 and H. R. 5118 (same bill) June 23, 1944—all in 78 Cong. 2d Sess.

"United States property in enemy and enemy occupied countries exceed in value enemy property in the United States. The policy of non-confiscation is thus not only a sound moral principle, but in this instance, is a course of enlightened self interest."

The above statement overlooks several points, as brought out in a special article in the *New York Times* of December 5, 1943, by Mr. Godfrey N. Nelson, discussing under the title, "Alien Properties Domestic Problem" the bill H. R. 3672:

"It would be conceivable that if there were the slightest apprehension of our winning the war it would be highly inadvisable to take legislative steps to reduce to ownership of the United States the vast amount of enemy-owned property seized by the Alien Property Custodian. Since there can be no such apprehension, however, one is forced to inquire into the question as to why the subject of such ownership has not been brought up in the Congress for full and free discussion.

"The matter of policy which should be settled without undue delay is primarily to preclude the return to enemy aliens of seized property before the valid claims of American citizens shall have been satisfied; to simplify the procedure by which such claims may be established by granting American courts jurisdiction over the determination of such claims.

"This subject is of vital interest to the American taxpayer who stands to lose either by delayed action or by failure of the Congress to make proper provision for the disposition of property now held by the Government only as custodian. Mr. Gearhart observed: 'Prolonged Government administration will most certainly diminish the value of these assets, whereas their prompt sale, private management and aggressive commercial development would arrest depreciation and to that extent benefit all parties concerned, save those who plot profits upon the ruins of a war-torn world.' "

The second attack on the bill comes from Professor Edward Borchard of Yale University. Raising his voice against what he chooses to denounce as confiscation of private property, the cry which led us into the great error of returning enemy property after the first World War, he again advocates what amounts to abandonment of our own nationals of this war period, as he did for World War I, many of which nationals, because of the adoption of this mistaken policy, have never been compensated for their losses resulting from German war action, not even to this late day. This position is substantially one which was vigorously criticized and condemned by Mr. Garner, then a member of the House, later Vice President of the United States. It is interesting to recall that at the hearings before the Ways and Means Committee and the Interstate and Foreign Commerce Committee in 1926, when Mr. Newton of the committee stated that Professor Borchard (who filed voluminous memoranda and briefs in favor of the return of enemy property) "seemed to appear as a friend of the court," Mr. Garner remarked, and, not without reason, that "it develops now he is not only a friend of the court but a friend of the interested parties . . . retained by them for a consideration."

The third and other attack upon the principle upon which my bill is based is contained in a report of a special committee of the American Bar Association, the Chairman of which is Mr. Otto C. Sommerich of New York City. If one may be pardoned an *argumentum ad hominem,* one notes that Mr. Sommerich and another

member of this special committee, Mr. James J. Lenihan, Jr., appeared before the United States Supreme Court in 1937 on behalf of the Deutsche Bank[3] in an unsuccessful attack upon the Constitutionality of the so-called Harrison Resolution,[4] which alone stood between our injured American nationals and a further rape of their right to compensation for their losses occasioned by the war action of the German Government; one is thereupon inclined to discount the disinterestedness of the American Bar Association Committee and to speculate at whose instigation it was set up and its personnel chosen.

The principal conclusions I had reached when I introduced H. R. 3672 sum up as follows:

1. All enemy alien interest in seized properties and frozen assets should now and for all time be finally cut off.
2. Claimants who have suffered by action of our enemies should be afforded a present opportunity to go into the Federal Court, to there establish their claims according to the principles of Anglo-Saxon law.
3. Congress should at once provide for an expert commission to advise Congress when the necessity arises in respect to what disposition should be made of enemy property.

My suggestion as to the appointment of an expert commission to advise the Congress seems to be supported by the intricacy of the field as explored in the various articles in this symposium. The importance of the related subjects cannot be denied. One has but to read the numerous topics which have been denominated as the subjects for special treatment and to contemplate the many aspects of each phase to realize that the problems of enemy property are too intricate and involved a subject for an unaided Congressional committee to attack in the absence of full hearings, careful study, painstaking analysis and scientific condensation in the pursuit of a sound conclusion, in search of a solution which will be fool-proof against vexatious litigation, intolerable delays and that distortion and abuse which might completely pervert the intention and objectives of the Congress. Hasty, ill-considered action must be avoided this time. The mistakes we made following the conclusion of World War I must not be repeated. I hope this symposium will help point up the problems and the difficulties.

My position is very different, however, with respect to the other two principal conclusions I have stated above. They demand immediate action by Congress for reasons I stated on the floor of the House on November 15, 1943, reasons which will bear repetition here.

MR. GEARHART: "Mr. Speaker, according to unofficial reports which have reached my desk, we have lawfully in our possession and under our control enemy-owned properties, assets of various kinds, of a value of hundreds of millions of dollars.

"The Japanese and German owners of much of that colossal estate are now fighting in

[3] Cummings v. Deutsche Bank, 300 U. S. 115 (1937).
[4] Public Resolution No. 53 of June 27, 1934, 48 STAT. 1267.

the armed forces of their respective countries to destroy us, or, in some other related capacity, are bending every effort to insure the success of our relentless enemies.

"To the extent that this magnificent enemy-owned estate belongs to our most contemptible enemies—Japan and Germany—they who are now striving to destroy us, should it not be immediately sold to the highest bona fide American bidders and the proceeds devoted to the protection rather than the destruction of these United States? . . .

"No thought of confiscation exists in the bill I introduce. No question of confiscation is involved. As but a hasty glance at the measure will reveal, the bill requires that defeated enemy governments shall compensate their own nationals for any losses suffered by them as a consequence of the seizure of their property as enemy property by virtue of American legal action.

"At the time the nonconfiscation argument was advanced in the Seventy-first Congress, the then Under Secretary of the Treasury, Mr. Garrard B. Winston, was asked by Mr. Garner: 'Is it confiscation of property for us to carry out the provisions of a treaty where the German government itself obligates itself to pay its citizens on account of our taking this property?' The Under Secretary of the Treasury replied: 'If you take the property of an individual citizen to pay the debts of his government and his government reimburses him for the property taken, there is no inequity.'

"Again, how can it be said that not to use this enemy property to pay losses of American citizens suffered through enemy action is a sound moral principle? Are we to give back this property and let American citizens go totally uncompensated; or are we to compensate them out of the inexhaustible United States Treasury and make American taxpayers pay the losses caused by enemy governments, while the nationals of those countries get their properties back less only a custodian's charge of one-half of 1 percent, as they did to the extent of 80 percent when Germany made its former bid for world mastery?

"To delay action now is to open the way to an enemy-inspired propaganda campaign to arouse our sympathies for our soon-to-be-vanquished foe, at a time when the war spirit has waned, arouse a false sympathy for them which will lead us into a repetition of the same tragic mistake we made following World War No. 1.

"Failure to act decisively will hearten the German and Japanese bankers and industrialists, encourage them in the belief that, however the war goes, they will get back their American investments.

"Anyone who says there is an element of confiscation of private property in the bill I have introduced is either not familiar with its provisions or is deliberately misrepresenting the facts. It was introduced to protect American citizens against those crafty creatures, some of them, I am afraid, paid German agents, who would be so generous with other peoples' property, our American claims, and so cosmic in their love of our enemies that they would give back to their original owners the assets of our enemies and let our own people, who have suffered private losses at the hands of our enemies, go unpaid, or, failing in that, to unload the claims on Uncle Sam, that is, upon our American taxpayers who, through taxation, would have to raise the money to pay the claimants.

"My bill requires Germany and Japan, as a condition of peace, to pay their own nationals the full value of any property which they had in this country at the outbreak of the war. If we are going to use words like, 'confiscation,' let us use them honestly. If the word

'confiscation' is honestly defined, I challenge anyone to show where there is any confiscation under my bill. There can be no misunderstanding unless the word is purposely used to mislead and befuddle.

"If it is read in the light of established legal principles, my bill will be revealed as one based on the centuries-old principle of 'subrogation,' a principle of law quite the opposite in meaning from that which 'confiscation' implies.

"If anyone is disposed to argue that, possibly, Germany and Japan would not live up to their promise to compensate their own nationals, the answer is that, as between the two sets of claimants, the German and Japanese nationals, certainly not our American claimants, should assume that risk. To assert that Germany and Japan would not live up to their obligation is to declare them in advance quite unworthy of the confidence of even their own people. But that, Mr. Speaker, is not a matter of concern to those in whose interest we legislate.

"Be that as it may, my bill protects both the American claimants and the alien enemy nationals against confiscation of private property insofar as any law of the United States can do it. Therefore, we can well dismiss this cry of confiscation as unworthy of further consideration. It is but a weapon of obstruction, nothing more."

These conclusions and remarks made by me on the floor of the House were not made for oratorical effect or without careful study of the matter. Specialists, including practicing lawyers of undoubted integrity, had brought to my attention what had been said or written on both sides of the subject and the legislative and court action before and since the passage of the Trading With the Enemy Act in 1917 on our entry into the World War.

It is my firm resolve that we shall not be deceived, as was the 69th Congress, by the false argument that it is confiscation to apply Japanese and German assets in our possession to the losses of our own people who have been injured by our Axis enemies. This is not the result of hatred from experience on battlefields of France in the last war but the considered judgment of a public servant trying to view the matter from the point of our own best national interest. In reaching my judgments, I find myself not without support in the opinions of jurists of our present courts, outstanding citizens and eminent lawyers who have expressed themselves in favor of the principles embodied in my bill.

In my consideration of the subject, I have given careful thought and made inquiry as to whether there is any truth, not to speak of force, in the argument that the enactment of my bill will result in confiscation of private property, violate the settled principles of modern civilization, destroy the traditional policy or offend the Constitution of the United States and be a return to barbarism. I find there is no truth in any of these statements.

I have approached the matter from five angles: Principles, precedents, policy, experience and national self-interest.

In principle, it is just that when a nation chooses to start a war of aggression, private losses resulting therefrom shall fall on its nationals and not on the nationals

of the aggrieved nation, if there is no other way of compensation.

There is no Constitutional principle, as our Supreme Court has repeatedly decided, which imposes any limitation on the use to which Congress may put the property and assets of enemy aliens.[5]

There is no principle of law or equity which requires a victorious nation to do more in the protection of private property than we did in the Treaty of Berlin[6] or in the Treaty of Versailles in Article 297-(i) which provided as follows: "Germany undertakes to compensate her Nationals in respect to the sale or retention of their property rights or interests in allied or associated states."[7] In this connection there is a very enlightening memorandum of the German Embassy in reply to Honorable William R. Castle, the Chief of Western European Affairs of the State Department, dated April 20, 1926, showing how Germany compensated her own citizens for their private property retained under the Treaty of Versailles by England, France, Belgium and Italy.[7a]

As to precedents, we have the action taken after the last war by England, France, Belgium and Italy in applying enemy property to enemy debts and we do not consider these barbarous nations. Nor can we deny the fairness of the British position as then taken that it had not confiscated private property: first, because it was credited on valid claims against Germany and its nationals; second, because the Allies had charged Germany with the duty, to which Germany had by treaty solemnly agreed, of repaying to the individuals the value of any property so taken from private citizens, and third, because it seemed eminently just, since if damages were to be collected but delay in payment was unavoidable, that nationals of the wrongdoing country should suffer the hardship of delay rather than those of the country that had been wronged. The soundness of this British viewpoint seems established by the fact that American nationals after twenty-seven years are still waiting full compensation for war losses inflicted by Germany.

As to policy, I think my attention has been called to nearly all the statements that have been made on the law of enemy property and its uses since the days of Grotius. Time and again assertions of doubtful validity have been hung on these quotations before Congress and its committees; paragraphs are torn from their contexts, sentences are garbled and fallacious contentions are drawn from a single phrase or cliche. George Washington, Thomas Jefferson, Benjamin Franklin, Alexander Hamilton, Chief Justice Marshall, Woodrow Wilson, John Bassett Moore,

[5] United States v. Chemical Foundation Inc., 272 U. S. 1, 9-11 (1926); Woodson v. Deutsche Gold und Silber Scheideanstalt Vormals Roessler, 292 U. S. 449 (1934); Cummings v. Deutsche Bank, 300 U. S. 115 (1937); see Z. & F. Assets Realization Corp. v. Hull, 311 U. S. 470, 490 ff. (1941). See also McNulty, *Constitutionality of Alien Property Controls, supra,* this symposium, p. 135 *et seq.*

[6] See Sec. 5 of that Treaty, providing that this government is to retain property of German nationals until suitable provision is made for claims of our nationals against the German government. Vol. III of TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS, AND AGREEMENTS (SEN. DOC. No. 348, 67th Cong. 4th Sess. 1923) 2597.

[7] *Id.* at 3464.

[7a] *Hearings before the Committee on Finance, United States Senate, on H. R. 15,009,* 69th Cong., 2d Sess. (1927) 367.

Philander C. Knox, Charles E. Hughes when Secretary of State, his dinstinguished successor Cordell Hull, and a goodly sprinkling of university professors, are all called as witnesses by those who cry confiscation and barbarism and "quote scripture for their purpose." Limitations of space prevent detailed exploration and refutation here. Suffice it to point out that Mr. Hull's recent words have been quite consistent with the position he took, as a member of the House of Representatives, in 1926 in denouncing arguments advanced on behalf of German interests for the return of enemy property, when he joined with Mr. Garner in opposing the scheme that America should return all enemy property and pay its own nationals for losses inflicted by Germany as a "stupendous steal—the greatest in the history of this country."[8]

There is an old legal maxim that when the reason faileth, the law no longer applies. To the extent that what recognized authorities have said has been correctly quoted and applied as to the use to be made of enemy property, my bill is in full accord. Nations that abide by their treaties earn for their nationals a different treatment than treaty-breaking countries which present-day Germany and Japan have proved themselves to be. The generous treatment accorded Germany and her nationals as to enemy property after the last war was largely accounted for by the moral implications of statements made by Woodrow Wilson and members of the Congress, such as the following words of the then President on April 2, 1917: "We seek no indemnities for ourselves, no material compensation for the sacrifices we shall freely make. . . ." "We have no quarrel with the German people, we have no feeling toward them but one of sympathy and friendship." That, in my opinion, is not the present-day attitude of the American people toward either Japan or Germany and I am opposed to any disposition of the property of their nationals which proceeds on any such sentiment.

I come next to what our experience and the most recent action of our courts and Congress has shown, to my satisfaction, to be not only the right policy as to seized enemy property and assets, *but our established policy*. Unanimous decisions of our Supreme Court have brushed aside the specious contentions that any right, susceptible of Constitutional protection, subsists in seized enemy property; and has reaffirmed the principle of international law that we have the unlimited right to use it as we will.[9] Since the end of the last war, the Congress of the United States has twice acted positively and definitively, to establish the American policy in this matter—in 1934 when it passed the Harrison Resolution[10] and in 1940 when it en-

[8] See RETURN OF ALIEN PROPERTY, *Hearings before a Subcommittee of the Committee on Ways and Means sitting in conjunction with a Subcommittee of the Committee on Interstate and Foreign Commerce on H. R. 10820*, 69th Cong. 1st Sess. (April, 1926), *passim;* also RETURN OF ALIEN PROPERTY—No. 3; *id.* No. 4 (Nov., 1926) pp. 25 ff., 67, 199, 235, 395—*cf.* p. 635 (letter from Mr. Sommerich to the Committee).

[9] Brown v. United States, 8 Cranch 110 (U. S. 1814); Miller v. United States, 11 Wall. 268 (U. S. 1870); Stoehr v. Wallace, 255 U. S. 239 (1921); cases cited *supra* note 5; McNulty, *Constitutionality of Alien Property Controls, supra,* this symposium, p. 135.

[10] *Supra* note 4.

acted Private Law 509.[11] The last word of the Congress of the United States on the subject of enemy property is summed up in the unanimous report of the Committee on Foreign Relations of the Senate in connection with the bill leading up to the above private law.[12]

This report is so clear, conclusive, scholarly and expressive of my own views that I quote from it *in extenso*.

". . . The foundation of law for the bill is as follows:

"The Trading with the Enemy Act, October 6, 1917 (40 STAT. 411), section 12, at page 424:

" 'After the end of the war any claim of any enemy or of an ally of enemy to any money or other property received and held by the Alien Property Custodian or deposited in the United States Treasury, shall be settled as Congress shall direct. . . .'

"Joint resolution terminating the state of war between the Imperial German Government and the United States of America, and between the Imperial and Royal Austro-Hungarian Government and the United States of America, July 2, 1921, part 1 (42 STAT. 105).

"The Treaty of Berlin between the United States and Germany August 25, 1921, to restore the friendly relations between the two nations, part 2 (42 STAT. 1939), incorporates the above act of July 2, 1921, which reserves to the United States and its nationals . . .

" 'all rights, privileges, indemnities, reparations, or advantages, together with the right to enforce the same, to which it or they have become entitled under the terms of the armistice, signed November 11, 1918, or any extensions or modifications thereof; or which were acquired by or are in the possession of the United States of America by reason of its participation in the war or to which its nationals have thereby become rightfully entitled; or which, under the treaty of Versailles, have been stipulated for its or their benefit; or to which it is entitled as one of the principal allied and associated powers; or to which it is entitled by virtue of any act or acts of Congress; or otherwise.'

"And section 5 thereof, providing in part:

" 'All property of the Imperial German Government, . . . and of all German nationals, which was, on April 6, 1917, in or has since that date come into the possession or under control of, . . . the United States of America . . . shall be retained by the United States of America and no disposition thereof made, except as shall have been heretofore or specifically hereafter shall be provided by law until such time as the Imperial German Government . . . shall have . . . made suitable provision for the satisfaction of all claims against said Governments respectively, of all persons, wheresoever domiciled, who owe permanent allegiance to the United States of America and who have suffered, through the acts of the Imperial German Government, or its agents, . . . since July 31, 1914, loss, damage, or injury to their persons or property, directly or indirectly. . . .'

"Article I provides:

" 'Germany undertakes to accord to the United States . . . all the rights, privileges, indemnities, reparations, or advantages specified in the aforesaid joint resolution of the Congress of the United States of July 2, 1921, including all the rights and advantages stipulated for the benefit of the United States in the Treaty of Versailles which the United States shall fully enjoy notwithstanding the fact that such treaty has not been ratified by the United States.'

[11] 54 STAT. (part 2) 1341 (July 19, 1940).

[12] SEN. REP. No. 1300, 76th Cong. 3d Sess. (1940).

"The agreement between the United States and Germany for a Mixed Commission to determine the amount to be paid by Germany in satisfaction of Germany's financial obligations under the treaty concluded between the two Governments on August 25, 1921, signed at Berlin August 10, 1922, part II (42 STAT. 2200).

"The fourth annual message of President Calvin Coolidge, made to the Sixty-ninth Congress, second session, Messages and Papers of the Presidents, Coolidge 1925-29, at page 9629:

" 'We still have in the possession of the Government the alien property. It has always been the policy of America to hold that private enemy property should not be confiscated in time of war. This principle we have scrupulously observed. As this property is security for the claims of our citizens and our Government, we cannot relinquish it without adequate provision for their reimbursement. Legislation for the return of this property, accompanied by suitable provisions for the liquidation of the claims of our citizens and our Treasury, should be adopted. If our Government releases to foreigners the security which it holds for Americans, it must at the same time provide satisfactory safeguards for meeting American claims.'

"The Settlement of War Claims Act of 1928, an act to provide for the settlement of certain claims of American nationals against Germany, Austria, and Hungary, and of nationals of Germany, Austria, and Hungary against the United States, and for the ultimate return of all property held by the Alien Property Custodian (45 STAT. 254).

"Public Resolution No. 53, Seventy-third Congress (48 STAT. 1267), June 27, 1934, amending the Settlement of War Claims Act of 1928.

"The Settlement of the War Claims Act of 1928, in part, provided for the return of 80 percent of the seized former enemy alien property and the retention of 20 percent thereof by the Treasury of the United States as security for the agreement of Germany to pay in full all proved damages of American nationals.

"Thus was created the German special deposit account.

"That legislation, and the Trading With the Enemy Act of 1917 expressly retained in the Congress of the United States control and disposition of this German special deposit account and any money or other property received and held by the Alien Property Custodian, or deposited in the United States Treasury, and the Supreme Court of the United States has twice unanimously expressed the following views:

"In *Woodson, Alien Property Custodian et al. v. Deutsche Gold und Silber Scheideanstalt Vormals Roessler* (292 U. S. 449 (1934), at p. 453), Mr. Justice Sutherland, delivering the opinion, said:

" '. . . The Trading with the Enemy Act was passed by Congress in the exertion of the war power; its purpose was to weaken enemies by diminishing the sources from which they could obtain aid, and to strengthen this country by adding to resources for the successful prosecution of the war. Section 12 declares that after the end of the war any claim of any enemy to recover money or property received and held by the Custodian or deposited in the United States Treasury "shall be settled as Congress shall direct" (40 STAT. 424). While this suggests that confiscation was not effected or intended, it plainly shows that Congress reserved to itself full freedom at any time to dispose of the property as might be deemed expedient and to deal with claimants as it should deem to be in accordance with right and justice, having regard to the conditions and circumstances that might arise during and after the war. It is clear the enemy owners were divested of every right in respect of property taken and held under the act (United States v. Chemical Foundation, 272 U. S. 1, 9-11).'

"In *Cummings, Attorney General et al. v. Deutsche Bank and Discontogesselschaft*

(300 U. S. (1937), p. 115, at p. 120), Mr. Justice Butler, delivering the opinion of the Court, said:

" 'Public Resolution No. 53 is not repugnant to the fifth amendment. By exertion of the war power, and untrammeled by the due process or just compensation clause, Congress enacted laws directing seizure, use, and dispositition of property in this country belonging to subjects of the enemy. Alien enemy owners were divested of every right in respect to the money and property seized and held by the Custodian under the Trading With the Enemy Act (United States v. Chemical Foundation, 272 U. S. 1, 9-11; Woodson v. Deutsche, etc., Vormals, 292 U. S. 449, 454). The title acquired by the United States was absolute and unaffected by definition of duties or limitations upon the power of the Custodian or the Treasurer of the United States. Congress reserved to itself freedom at any time to dispose of the property as deemed expedient and right under circumstances that might arise during and after the war. Legislative history and terms of measures passed in relation to alien enemy property clearly disclose that from the beginning Congress intended after the war justly to deal with former owners and, by restitution or compensation in whole or part, to ameliorate hardships falling upon them as a result of the seizure of their property. But that intention detracted nothing from title acquired by the United States or its power to retain or dispose of the property upon such terms and conditions as from time to time Congress might direct. As the taking left in enemy owners no beneficial right to, or interest in, the property, the United States did not take or hold as trustee for their benefit.'

"And at p. 122:

" 'To grant to former alien enemy owners of the privilege of becoming entitled upon conditions specified to have returned to them the property of which they had been deprived by exertion of the war power of the United States was made by the Congress in mitigation of the taking and in recognition of "the humane and wise policy of modern times" (Brown v. United States, 8 Cranch 110, 123). In United States v. White Dental Co. (274 U. S. 398) it appears that during the war the German Government sequestered the property of a German corporation which, through ownership of all its capital stock, was controlled by an American corporation. Speaking of the taking we said (pp. 402-403): "What would ultimately come back to it (the American owner), as the event proved, might be secured not as a matter of right, but as a matter either of grace to the vanquished or exaction by the victor. . . . It would require a high degree of optimism to discern in the seizure of enemy property by the German Government in 1918 more than a remote hope of ultimate salvage from the wreck of the war." We think it clear that the grant by the Settlement of War Claims Act was made as a matter of grace and so was subject to withdrawal by Congress (United States v. Teller, 107 U. S. 64, 68; Frisbie v. United States, 157 U. S. 160, 166; Lynch v. United States, *supra,* 577). The resolution does not infringe the fifth amendment.'

"It being clear, therefore, that Congress is invested with full power, and that the claimant has no other resort or recourse for just compensation, it is the clear duty of the Congress to enact this measure following the principle laid down by Mr. Adams in the Spanish Treaty case of 1819, as to which the following is quoted in Moore's International Law Digest (vol. 5, p. 188):

" 'The treaty of February 22, 1819, which provided for the cession of the Floridas by Spain to the United States, and for the mutual adjustment of various claims, stipulated for the exchange of ratifications within 6 months. Before the treaty was signed, Mr. Onis, the Spanish minister, delivered to Mr. Adams, who was then Secretary of State, his full powers, which contained the following clause:

" 'Obliging ourselves, as we do hereby oblige ourselves and promise, on the faith and

word of a King, to approve, ratify, and fulfill, and to cause to be inviolably observed and fulfilled, whatsoever may be stipulated and signed by you; to which intent and purpose, I grant you all authority and full power, in the most ample form, thereby as of right required.'

"With reference to this passage, Mr. Adams, after citing Vattel, book 2, chapter 12, section 156, and Martens' Summary, book 2, chapter 1, section 3, said: 'The obligation of the King of Spain, therefore, in honor and in justice, to ratify the treaty signed by his Minister, is as perfect and unqualified as his royal promise in the full power; and it gives the United States the right, equally perfect, to compel the performance of that promise. . . .

" 'The President considers the treaty of 22nd February last as obligatory upon the honor and good faith of Spain, not as a perfect treaty (ratification being an essential formality to that), but as a compact which Spain was bound to ratify; as an adjustment of the differences between the two nations, which the King of Spain, by his full power to his minister, had solemnly promised to approve, ratify, and fulfill. . . .

" 'The King of Spain was bound to ratify the treaty; bound by the principles of the law of nations applicable to the case; and further bound by the solemn promise in the full power. He refusing to perform this promise and obligation, the United States have a perfect right to do what a court of chancery would do in a transaction of a similar character between individuals, namely, to compel the performance of the engagement as far as compulsion can accomplish it, and to indemnify themselves for all the damages and charges incident to the necessity of using compulsion. . . .' "

This report of the Foreign Relations Committee of the Senate, followed as it was by favorable action in both Houses, approved by the President, seems to me to make very clear the American attitude as to enemy property upon which my bill is based.

While no reference has as yet been made to this report in any court decision, nor was the principle on which it is based referred to in any of the mass of litigation that grew out of the Trading With the Enemy Act, passed on our entry into the war in 1917, I am persuaded that the American policy as to the enforcement of the rights and protection of the property of this country and its citizens against invasion or denial thereof by foreign nations was in fact fixed in 1819, along with the Monroe Doctrine, by strong men of a weak republic, one of whom sat in the Presidential chair and the other beside him as Secretary of State.

As I read this report and discussed it with counsel who presented the matter to Congress, it became clear to me that it was on this principle that the Trading With the Enemy Act of 1917 was really based, consciously or otherwise, and that ancient and modern ponderous citations as to the confiscation in war of enemy property had become obsolete and irrelevant as far as this country is concerned. We had not adopted a policy of confiscation but of equity. The truth being that the United States has never precipitated or participated in any foreign war of aggression and that we fought only in self-defense, where rights of the nation or its nationals under treaties, agreements or international law have been invaded; in short only having engaged in war with those who broke treaties, violated their agreements and set at naught the law of nations, the Adams pronouncement is a complete

declaration of our policy and specifically applies to seized enemy property. Under the Adams pronouncement, when the rights of the nation or its nationals have been violated or invaded, we assert our sovereignty by enforcing our rights and the derivative rights of our citizens as would a court of equity. By way of protecting those rights we seize and take into costody the property within our dominion of the offending nation and its nationals. From a legal aspect, this action is in the nature of that little-known but well-established implementation of the Court of Chancery, known as an equitable attachment. The purpose of such seizure is to enforce the right denied or recover compensation for losses resulting from its violation. As in any case in municipal law and procedure, when either objective is accomplished, the attachment is released and the property seized passes back into the possession of its original owner. And the same happens when, as it were, the attachment is bonded or proper security is given. Failing recognition of the right denied and recovery of compensation for the losses resulting from its violation, the proceeds of the seized property are equitably applied, to the extent necessary, to compensate for losses suffered from the injury or on account thereof, but if inadequate for full compensation, leaving the offender still liable for the remainder of the loss which has been suffered. In all this there is no taint of confiscation and confiscation is simply not involved any more than in any strictly judicial process. When a nation starts or enters a war of offense or aggression, and, as a war measure, seizes the property within its domain of the nationals of the nation attacked, then perhaps we come upon an act of deliberate confiscation in conflict with the law of private property and the modern law of nations. But such has demonstrably never been true of the United States of America. Hence, in dealing with the subject of enemy property and its treatment by our government during or after this war, it sounds strange to hear any voice lifted in a cry of confiscation, except, possibly, professional legal voices so lifted for a fee.

While it does not seem to have been realized, it is the fact that the Settlement of War Claims Act of 1928[13] was drawn to the principle of an equitable attachment as I am assured by learned counsel who was consulted in regard to that measure. Had the Settlement of War Claims Act of 1928 been enforced in accordance with its terms, there might today have been a different story as to unpaid American claimants. The term equitable attachment was not used in the informal discussions which led to the rationale of that measure; it was, perhaps, a bit too technical for popular comprehension, but the expression was then used that the new bill would work on the principle of a compression tank, a homely equivalent of equitable attachment, and the seized property of German nationals would be released only as Germany paid or secured the payment of proved private war losses of American citizens. German duplicity and fraud and our own misguided trustfulness defeated the purpose of that Act, but it set a high ideal of international justice and established an equitable basis for the treatment of enemy property. Germany's complete

[13] *Supra* note 1.

violation of the solemn agreements on which this Congressional action relied, renders it, of course, absurd to think of so dealing with enemy property now in our control while Japanese treachery hardly entitles that country to claim debatable niceties of international law. Obviously, we must and shall apply every dollar of seized enemy property to proved war losses of our nation and its citizens and we should do it *instanter*.

In the doing of it, we shall have neither acted in hatred or disregard of international law or inconsistently with our Constitution and traditions or in violation of the principles of equity and good morals, for the conclusive reason that it is now apparent beyond cavil or doubt that the nations with which we are at war do not observe treaties and solemn covenants and that they have not the remotest possible chance of showing the ability, if they had the bona fide intent, to compensate this nation or its nationals for war losses which they have inflicted.

This concept of equity as the unacknowledged and, perhaps, unrecognized rationale of American policy as to seized enemy property is not, of course, the motivating force in the original seizure of enemy property. It is seized and taken into custody, in the first instance, as a war measure to disable the enemy and to make use of the enemy-owned facilities, notably shipping, means of communication and raw materials, patents and formulas, needed for the production of arms and ammunition and their mobilization and transport. Once in custody, however, it is held not for unjust enrichment but to offset losses caused by enemy action during the war and once it becomes certain that such losses cannot or will not be indemnified except by resort to such seized enemy assets, its instant application to such purpose is indicated, without the slightest tinge or taint of confiscation. Citizens of any country, having ventured for profit to invest or create assets in foreign lands, must in full fairness answer with those assets for wrong doing of a marauding government which exists by their choice or acquiescence, and if their government willfully fail or is unable to compensate for the injuries to another nation or its nationals, it is again but to resort to long established principles of equity to hold that the private citizen, who stands surety for his government's action, must make good his secondary liability by his assets located in foreign domains and be content to be subrogated for his private loss to claims against his own government for the property so made to respond. Were I to attempt to summarize what I conceive to be the American policy toward enemy owned property, I would put it in four words: *protective seizure, equitable disposition,* having due regard to the maxim that one must be just before one is generous, that where the equities are equal the law must prevail. The high courts of this country have in dealing with enemy property repeatedly given full force and effect to equitable principles, regardless of the character of the controversy or the nature of the property involved.

This diversion into background material has been intentional, for refinements in doctrinaire systems of law (international, constitutional or otherwise) are not in

the spirit of the American public. It avails little for practical purposes to probe the technical aspects of enemy property, when the ultimate disposition of it rests with Congress which does not decide such issues on *a priori* juridical grounds but as it interprets the will of the people, within the framework of the Constitution. The general sense of fair play so prevails among our people that the strongest demonstration of legal and constitutional technical right to do as we see fit with enemy property will not suffice, unless it be shown that our use of it is just and fair. That is the reason after the last World War we did not go the full distance of England, France, Belgium, and Italy of forthwith executing the same power they had availed of and did not instantly apply all seized enemy property to debts owing by the enemy and its nationals. Experience has shown we were wrong and, as a matter of fact, the beginning of Nazi insanity, Germany's self-destruction and the attendant Axis alliance may be found in the summer of 1931 when the German Reich, in simple English "welched" on the agreement by which, in good faith, we had been induced to return to her nationals 80% of the private property and assets we had seized and had the right by law and treaty to retain and use as we saw fit. As events have shown, she broke her agreement in order to help provide the means to start the present war.

Seizure and use of German and Japanese assets, whether owned publicly or privately, rests, then, on equitable principles, not confiscation and upon constitutional principles, not barbarism, as some would have us believe.

I come to the final point from which I have viewed the subject, that of national self-interest.

As yet, my own mind is open in such questions as these:

To what extent, if any, shall we provide relief or payment, out of the proceeds of enemy property or otherwise, to others than American citizens; for instance, those who are aliens, but not enemy aliens, who suffered private losses in foreign countries through Axis invasion of the so-called conquered nations?

If any such recognition is to be given to injured aliens, is it to be at the expense of American citizens who have suffered private losses, through depletion thereby of any fund eventually established for the purpose?

Is a distinction to be made between such aliens who were resident abroad at the time the injuries were suffered and those who were domiciled here when the loss occurred?

On this point, however, a difference is to be recognized between permitting all friendly aliens or resident aliens, if so limited, to prove their claims in American courts and permitting them to share in any funds available for compensation. The bill offered by me throws the doors of our Federal Court wide open for proof of claims but carries no commitment, express or implied, which in any way limits the

Congress from excluding or including any particular group or class of claimants in the final distribution, much as in a federal equity receivership. I think that is as far as we should now go; and I would not oppose any amendments which gave the courts power to limit proof of claims to American citizens and non-enemy aliens resident in this country when the loss occurred, including German nationals not resident in Germany when war was declared or since escaped, upon proof of their loyalty to this country.

Another question on which I have reached no final conclusion is as to the eventual disposition of the very valuable seized enemy-owned patents, although my mind is very clear that unrestricted free licensing of such patents by the Alien Property Custodian is unwise and unjust. My bill interdicts this in the following language:

"(d) The Alien Property Custodian is directed to offer for sale, and to sell, with all convenient speed, all enemy patents, trade-marks, and copyrights vested in him, except such patents, trade-marks, and copyrights belonging to persons whose funds are exempt from seizure as defined in subdivision (b) hereof, in accordance with, and upon the terms and conditions set forth in section 12, subdivision 4, of this Act: Provided, however, That the Alien Property Custodian shall not offer for sale, or dispose of such patents, trade-marks or copyrights as the President, by Executive order, shall exempt from sale on account of the fact that such exemption is necessary to the prosecution of the war: Provided further, That as to other than such patents, trade-marks, and copyrights, the Alien Property Custodian is directed not to grant any further license or licenses for the use thereof except upon payment of fees commensurate with the reasonable value of such licenses, such fees to be transmitted by him forthwith to the Secretary of the Treasury as provided in subdivision (a) hereof: And provided further, That no such fee to be agreed upon shall be deemed commensurate with the reasonable value therof, unless the Secretary of Commerce, upon due investigation, certifies that he considers the fee to be paid as a reasonable compensation for such license agreement."

I do not believe in socializing or nationalizing what we have always regarded as private property, including patents, and it will take a lot of sound argument to convince me that these patents should not forthwith be put in American ownership of competent management and established financial responsibility. They should not be given away like bread at a circus to make a Roman holiday for promoters or irresponsible financiers.

This leads to a further point of major importance as to which I am not certain what is the best implementation. Neither these patents (and much the same may be said, *mutatis mutandis,* about enemy owned trade-marks, copyright and secret formulas) nor any other of these enemy assets should be permitted to drift back or be siphoned back into the original enemy ownership through tricks and devices of nominally American corporations, as occurred after the last war. Unless someone presents a better idea, it is my intention at the proper time to offer an amendment to my bill, following a precedent in the National Housing Act, whereby some gov-

ernment official or agency will for a safe and reasonable period, retain a nominal stock interest in any corporation acquiring certain types of enemy assets, so there will be what in ecclesiastical and charitable corporations is called a power of visitation. As events proved after the last war, promises, pledges and solemn covenants provide no safeguard against the recapture of these assets by the original enemy owners. It is amazing to learn to what extent our mistakes in handling enemy property after the World War supplied the means to our present enemies not only of preparing for this one but of building the machinery and devices of modern warfare. For a full and explicit discussion of the re-entrenchment of enemy cartels, to which I referred on the floor when introducing the bill, attention is called to the recent report of the Kilgore Committee.[14]

However, I do recognize the fact that some reservations are to be made with regard to the use of these patents, as I indicated on the floor of the House:

> MR. PHILLIPS: I wish to ask the gentleman if it is not a fact that there also would be involved the use, for the public good, of certain patents, chemical formulas, and medical processes in the procedure such as you suggest?
>
> MR. GEARHART: Yes, I failed to mention that the bill I have drawn provides that whenever the President is of the opinion that a patent should not be sold, it should be retained and licensed to American manufacturers, or, should it be deemed advisable, it might be released to the public domain.

There remains one other factor of national self-interest, which is easily lost sight of in these days of feverish war spending with the national debt reaching toward three hundred billion dollars. That factor is the United States Treasury. Twenty years ago it was seriously proposed, with the backing of the then Secretary of the Treasury and the then Chairman of the Foreign Relations Committee of the United States Senate, and it came very near happening, that the United States release all seized enemy property and pay out of its own Treasury the private losses which its own citizens had suffered at the hands of Germany during the World War. This indicates the extent to which some persons were confused by sentiment and misled by the fallacious argument of confiscation; other influences also entered in, of which we hear the present-day echo in the report of the Commerce Department of the United States Chamber of Commerce, contending that as a matter of expediency and good business, we should "turn the other cheek" and return to German Nazis and Japanese treachery private property and assets which they had in this country when Pearl Harbor was attacked. Then, too, I regret to say as a member of that profession, there were always lawyers ready to espouse the enemy side of any question of public or private concern. The post-war load of accumulated debt facing this country is staggering enough. Obligations which must be met in full to the returning men of the services will add tremendous new financial burdens on our

[14] CARTELS AND NATIONAL SECURITY, 78th Cong., 2d Sess. (1944) 2 parts (Report from Subcommittee on War Mobilization pursuant to S. Res. 107).

taxpayers. As a member of the Congress in dealing with decent compensation of American soldiers who have lost all but life itself, with American citizens who have had immeasurable material losses, I do not intend to have to square my conscience with a moment's hisitancy or delay in applying instantly and to the last dollar every German and Japanese asset in our possession to the compensation of the injuries and losses they have brought upon our people leaving, as my bill contemplates, Germany and Japan to compensate their nationals for private property so applied by us to the losses of our nationals. That to me is a sound and moral principle; that is the course of enlightened national self-interest; that is the way of insuring against future aggression by treaty-breaking nations.

INDEX—ENEMY PROPERTY